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ABSTRACT

A wide variety of contemporary legal issues, involving all levels of public and private education, are addressed in the 20 separate chapters comprising this volume. The titles and authors of the chapters are as follows: (1) Due Process of Law: *Loudermill v. Cleveland Board of Education* (Hooker); (2) Schools, Technology and the Law (Helm); (3) Censorship: *Post Pico* (Terry); (4) Plagiarism and Cheating (Mawdsley, Permut); (5) Sexual Harassment in Employment and Educational Practices (Wondschein, Greene); (6) Management Prerogatives and the Scope of Public School Bargaining (Baldwin); (7) Collective Bargaining (Freeman); (8) A New Generation of Tenure Problems (Lae); (9) Preventive Law for School Administrators (Hawkins); (10) Minimizing Liability for the College Administrator: *Female Student Protection* (Batson); (11) Searching of Students after *New Jersey v. TLO* (Van Geel); (12) Objective Testing To Assess Teacher Competency (Beckham); (13) Home Instruction (Devins, Zirkel); (14) Dynamic Gradualism (Carter, et al.); (15) School Finance Reform through Litigation (Rossmiller); (16) Responding to Child Abuse (Myers, et al.); (17) Special Education (O'Hara); (18) An Update on the Ever Growing Momentum of Teacher Competency Testing (Flipppo); (19) Keeping "Education" in Education Law (Reutter); and (20) Teacher School Law (Nolte). (CJH)

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Due Process of Law: *Loudermill v. Cleveland Board of Education*

Clifford P. Hooker

In order to fully understand the implications of the *Loudermill*¹ case, it is necessary to be familiar with some basic due process concepts, going back to the Supreme Court's landmark case in 1972, *Board of Regents v. Roth*.² The due process clause of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The threshold question in any procedural due process case is whether an individual has a liberty or property interest at stake. The significance of *Roth* is that it established the foundation of all future due process claims by stating that a legitimate claim of entitlement must exist before due process protections apply. Property interests are not created by the Constitution. We must look to existing rules or understandings that stem from an independent source such as state law.

Roth's property interest in employment at Wisconsin State University was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. They specifically provided that his employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever. The Court said:

Thus the terms of Roth's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, Roth surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.³

In *Perry v. Sindermann*,⁴ a companion case decided by the Court the same day, the Court applied *Roth*'s principles and held that while a subjective "expectancy" of tenure is *not* protected by procedural due

1. 105 S. Ct. 1487 (1985).

2. 408 U.S. 564 (1972).

3. *Id.* at 577-78.

4. 408 U.S. 593 (1972).

process, Sindermann's allegation that the college had a "de facto" tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to a property interest in continued employment. The Court said: "Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."⁵

After the existence of a property interest is established, the next question is a determination of what process is due before a person can be deprived of that interest. In the 1974 case of *Arnett v. Kennedy*,⁶ Wayne Kennedy was a nonprobationary federal employee in the competitive civil service in the Chicago Regional Office of the Office of Economic Opportunity. He was dismissed from his position for allegedly having made recklessly false and defamatory statements about other OEO employees. Though he was advised of his right under civil service regulations to reply to the charges, and was informed that the material on which the dismissal notice was based was available for his inspection, he did not respond to the charges. Instead, he sued in federal court, claiming that the procedures established by and under the Lloyd-La Follette Act for the removal of nonprobationary employees from the federal service deny employees procedural due process. He claimed that he was entitled to a full adversary hearing before his removal. The Lloyd-La Follette Act allowed removal "only for such cause as will promote the efficiency of the service" and required written notice of the charges and a reasonable time for a written answer and supporting affidavits. Civil service regulations enlarged the statutory provisions by requiring thirty days' advance notice before removal and entitled the employee to a post-removal evidentiary trial-type hearing at the appeal stage.

Although no consensus in reasoning emerged, a majority of the Supreme Court agreed that Kennedy was not entitled to a full evidentiary hearing before discharge. Justice Rehnquist, in his plurality opinion that was joined by Chief Justice Burger and Justice Stewart, stated: "where the grant of a substantive right is inextricably intertwined with the limitation on the procedures which are to be employed in determining that right, a litigant in the position of [Kennedy] must take the bitter with the sweet."⁷ The Act does not create, and the due process clause does not require, any additional expectancy of job retention.

This plurality view in *Arnett*, however, has not been enshrined in the law. And the *Loudermill* case laid to rest this "bitter with the sweet" notion that states are free to establish whatever procedures they so choose. Justice Powell, in his forceful concurring opinion in *Arnett*

5. *Id.* at 603.

6. 416 U.S. 134, rehearing denied, 417 U.S. 977 (1974).

7. *Id.* at 153.

emphasized that the Lloyd-La Follett Act and the existing regulations already afforded sufficient pretermination due process.⁸

Only in the case of *Goldberg v. Kelly*,⁹ in 1970, has the Supreme Court held that due process requires an evidentiary hearing before a temporary deprivation, in that case, before the termination of welfare benefits. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence, and that termination of aid pending resolution of a controversy over eligibility might deprive an eligible recipient of the very means by which to live while he waits.

Facts in *Loudermill*

Loudermill was employed as a security guard by a private firm that supplied guards to the Cleveland Board of Education. After the private firm declared bankruptcy, Loudermill applied for a similar position with the board of education. As part of the application, Loudermill was asked, "Have you ever been convicted of a crime (felony)?" Loudermill responded "No," and signed a declaration that all of his statements were correct to the best of his knowledge, and "that I am aware that any false statements will be sufficient cause for dismissal from or refusal of an appointment for any position with the Cleveland Board of Education."

The Board accepted Loudermill's application on September 25, 1979, and he began work on that day. As a classified civil service employee under Ohio law, he could be discharged only for "cause." In the event of discharge, the statute required that the discharge order state the reasons for the discharge and that a trial board be appointed to hear any appeal within thirty days.¹⁰

After a year of employment, the Board of Education transferred Loudermill to a position with the newly created department of safety and security. A routine examination of his records revealed that he had been convicted of a felony twelve years previously, in 1968.

By letter dated November 3, 1980, the business manager of the board advised Loudermill that he was being dismissed. The letter explained that the discharge stemmed from his dishonesty in filling out the employment application. Loudermill claimed, that if he had been afforded an opportunity to respond to the charges before dismissal, he could have presented a meritorious defense to demonstrate his honesty. He believed that as a result of plea bargaining, he had been convicted of a misdemeanor, and not a felony.

Loudermill filed a notice of appeal with the Cleveland Civil Service Commission. The next day, the board of education adopted a resolution officially approving his discharge. Almost three months later, Loudermill appeared for a hearing before the Cleveland Civil Service Commis-

8. *Id.* at 170 (Powell, J., concurring).

9. 397 U.S. 254 (1970).

10. Ohio Rev. Code Ann. § 124-34 (1984).

sion. A referee appointed by the commission recommended that he be reinstated. Without further testimony, the civil service commission rejected the referee's recommendation and affirmed Loudermill's discharge on July 20, 1981, eight and one-half months after his discharge.

Loudermill brought suit in federal court, alleging that the board of education's failure to allow him a pretermination hearing or an opportunity to respond to the charge of dishonesty deprived him of liberty and property without due process of law. He sought damages and a declaration that the Ohio statute was constitutionally invalid for failing to provide an opportunity for classified civil service employees to respond to charges before removal.

Donnelly's Case

Richard Donnelly was employed as a bus mechanic by the Parma, Ohio Board of Education. Like Loudermill, he was a classified civil service employee whose employment could be terminated only for cause. The board of education discharged Donnelly on August 17, 1977 because of his failure to pass an eye examination. The board previously afforded Donnelly an opportunity to retake the eye examination, but it had not provided him with an opportunity to challenge the discharge. Donnelly claimed that, if he had been afforded an opportunity to inform the board that it still employed another bus mechanic who had failed the eye examination, the board might have reevaluated the validity of the eye examination requirement and scrutinized more closely the purported reasons for discharging Donnelly, and might not have proceeded with the discharge.

After a full evidentiary hearing held nine and one-half months after his discharge, the commission ordered Donnelly reinstated, but made no provision for an award of back pay.¹¹ Donnelly brought suit in the Cuyahoga County Court seeking damages and back pay, but he failed to file his appeal within the fifteen-day limit prescribed by the statute.¹² The court therefore dismissed his complaint. So did the county court of appeals. And the Ohio Supreme Court denied review. Donnelly later brought suit in federal court.

The federal district court dismissed both Loudermill's and Donnelly's complaints. It held that, although Loudermill and Donnelly, under Ohio law, enjoyed a property interest in continued employment, due process did not require a pretermination hearing.

11. The statute authorizes the commission to "affirm, disaffirm, or modify the judgment of the appointing authority." Ohio Rev. Code Ann. § 124.34 (1984). The Parma Board of Education interpreted this as authority to reinstate with or without back pay and viewed the commission's decision as a compromise. The court of appeals, however, stated that the commission lacked the power to award back pay. 721 F.2d 550, 554 n.3. As the decision of the commission is not in the record, the Supreme Court was unable to determine the reasoning behind it. 105 S. Ct. 1487, 1490 n.1.

12. Ohio Rev. Code Ann. § 119.12 (1984).

A divided panel of the Sixth Circuit Court of Appeals reversed, holding in favor of the employees.¹³ The court held that the school boards' failures to give them an opportunity to present evidence challenging the proposed discharges violated their due process rights under the fourteenth amendment. The Ohio statute cannot be applied in a way that denies the rudiments of due process.

The court of appeals also addressed the employees' claims that the delays in the post-termination hearings deprived them of due process. Neither employee received a hearing within the thirty-day statutory period. In *Loudermill's* case, a referee did not conduct a hearing until three months after his dismissal, and the full commission did not hold a hearing until after eight months had elapsed. In *Donnelly's* case, a hearing was not held until nine and one-half months after his dismissal. The court determined that the state's failure to hold the hearings within the statutory time period "in and of itself did not violate [their] constitutional rights."¹⁴ The court held that the delays were not so excessive or unreasonable as to violate due process.

Supreme Court's Opinion

Justice White delivered the opinion of the Supreme Court, which affirmed the court of appeals in all respects.¹⁵ The Court rejected the argument that the property right in continued employment is conditioned by the procedures specified in the statute for its deprivation. The Court laid to rest for all time the "bitter with the sweet" argument that originated in the plurality opinion in *Arnett v. Kennedy*. The Court said that this "bitter with the sweet" approach misconceives the constitutional guarantee that tenure creates:

"While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

....

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due" The answer to that question is not to be found in the Ohio statute.¹⁶

The Court then evaluated the three factors identified in *Mathews v. Eldridge*¹⁷ to balance the competing interests at stake. In this case, these interests are the private interest in retaining employment, the

13. 721 F.2d 550 (6th Cir. 1983).

14. *Id.* at 563.

15. 105 S. Ct. 1487 (1985).

16. 105 S. Ct. at 1493 (citations omitted, quoting *Arnett v. Kennedy*, *supra* note 6, 416 U.S. at 167, Powell, J., concurring in part and concurring in result in part).

17. 424 U.S. 319 (1976).

governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of erroneous termination.

The Court noted that finding new employment takes time, and that this task is made more difficult when questionable circumstances surround the termination of the previous job. The employer has an interest in retaining a qualified employee rather than training a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than forcing its employees onto the welfare rolls. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions. Affording the employee an opportunity to respond before termination would impose neither a significant administrative burden nor an intolerable delay.

The Court noted that:

Both [employees] had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for *Loudermill*, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success.¹⁸

The Court concluded that the minimum requirements of due process for tenured public employees are oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why the proposed action should not be taken, is a fundamental due process requirement.¹⁹

It is important to note that *Loudermill* does not mandate a pretermination hearing, if "hearing" is assumed to mean an actual audience before a decisionmaker. An opportunity for the employee to present reasons why he should not be discharged, either in person or in writing is all that is required.

In a footnote the Court explained that this standard of minimal procedural safeguards rests in part on the provisions in the Ohio statute for a full post-termination hearing, stating, "the existence of the post-termination procedures is relevant to the necessary scope of pretermination procedures."²⁰

The Court then addressed the claim that the delay in the post-termination administrative proceedings was sufficient to amount to a separate

18. 105 S. Ct. at 1494 (footnote and citation omitted).

19. *Id.* at 1495.

20. *Id.* at 1496 n.12.

constitutional violation. Although the statute provides for a hearing to be held within thirty days of an appeal, the Ohio courts have ruled that the time limit is not mandatory. The statute does not place any time limit for the actual decision. The Court stated: "A 9-month adjudication is not, of course, unconstitutionally lengthy per se,"²¹ and held that there was no constitutional deprivation.

Discussion

Central to the Court's ruling is the finding that *Loudermill* and *Donnelly* had a property interest in continued employment. As the Court explained in *Roth*, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it."²²

Public employees with property interests in continued employment include: (1) employees under contract for a specified term of employment for the duration of the contract period; (2) tenured professional employees; and (3) tenured nonlicensed employees who, by statutory definition, can be dismissed only for cause. *Loudermill* and *Donnelly*, both civil service employees under the Ohio statute, came within this third category. Most tenured employees are probably already afforded more procedural protection than *Loudermill* requires.

After determining that an employee has a property interest in continued employment, school boards must provide due process before dismissal. *Loudermill* holds that a tenured public employee is entitled to an oral or written notice of the charges against him; an explanation of the employer's evidence; and an opportunity to present evidence, either in person or in writing, of why he should not be discharged.

Property interests can also be conferred by statutes such as the Veterans' Preference Law, PELRA, and many others; by collective bargaining agreements; and by *de facto* tenure policies arising from policies and practices officially promulgated by a public employer.

The term *de facto* tenure originated in the *Sindermann* case. *Sindermann* claimed that he and others legitimately relied upon an unusual provision that had been in the college's official faculty guide for many years, which read:

Teacher Tenure: Odessa College has no tenure system. The administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.²³

21. *Id.* at 1496.

22. 408 U.S. 564, 577 (1972).

23. *Id.* at 593, 602.

Moreover, Sindermann claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provide that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.²⁴

School boards must become sensitized to the legal implications of the words they use to avoid creating a *de facto* tenure system or other unintended property interests in continued employment. School boards should review their personnel policies, board policies, union agreements, employment application forms, any literature concerning employment, and interview procedures to determine whether any commitment has been made to nontenured employees that would support a claim of entitlement to continued employment or *de facto* tenure. If any conditions are implied, the school board should determine whether it can and should change them.

Public employees with no property interest in continued employment are *not* constitutionally entitled to procedural due process before dismissal. Probationary employees at the expiration of their employment contracts have no right to continued employment. However, in some states, courts have ruled that probationary teachers are entitled to notice of the substantive bases for their nonrenewals and an opportunity to challenge these reasons.²⁵ Still, in most instances, a school board can choose not to renew the contract of a probationary teacher without any requirement of notice and an opportunity to respond.

Employment-at-Will

The remaining group of employees who have no property right to continued employment are known as at-will employees. Noncertificated personnel who are not covered by termination procedures of a collective bargaining agreement and short-term or temporary employees would be considered at-will employees.

Most Americans do not have the security of tenure contracts. Most do not even have term contracts, and can be considered employees-at-will. The traditional employment-at-will doctrine holds that when an employment contract is for an indefinite or unspecified period of time, it may be terminated at any time, at the will of either party, for any reason or for

24. *Id.*

25. *Bridger Educ. Ass'n v. Board of Trustees, Carbon County School Dist. No. 2*, 678 P.2d 659 (Mont. 1984) (statement that district feels it "could find a better teacher" is insufficient to meet statutory requirement that nontenured teacher be given a reason for nonrenewal; entitled to notice that states what undesirable qualities merit a refusal to enter into a further contract); *Abell v. Nash County Bd. of Educ.*, 71 N.C. App. 48, 321 S.E.2d 502, (1984) (state statute imposes a duty on school boards to determine the substantive bases for a superintendent's recommendation of nonrenewal of a teaching contract to assure that the nonrenewal is not for a prohibited reason; board's records should reflect the specific substantive reason for nonrenewal).

no reason at all. This century-old doctrine has long been the rule in the majority of American jurisdictions.

This traditional rule has come under increasing attack in light of modern social and economic conditions. There are two major categories of exceptions to the general rule concerning termination of employees-at-will: statutory and judicial. No employer, whether public or private, is completely free to act at his unfettered discretion in discharging employees.

Examples of federal laws that restrict an employer's right to terminate employees include Title VII, which prohibits employment discrimination based on race, color, national origin, sex or religious preference. Employees asserting rights under the Fair Labor Standards Act, the National Labor Relations Act, and the Occupational Safety & Health Act are protected against employment discrimination, as are persons age forty to seventy. Federal contractors in programs receiving federal financial assistance cannot discriminate against handicapped persons. Other federal legislation prohibits discharge of employees to prevent vesting of pension rights, for performance of jury service, or for garnishment of debt.

Numerous state statutes impose either similar restrictions or additional ones, such as good cause limitations on the right to discharge veterans and restrictions on the use of polygraph examinations.

The trend toward judicial protection against arbitrary dismissal has accelerated in the past five years. The emerging case law of wrongful discharge has produced two major exceptions to the traditional at-will rule.

There is a growing trend to prohibit the termination of at-will employees where the discharge would contravene public policy. The protection of the public policy exception extends not only to employees who refuse to violate the law but also to employees who take actions required by law. Examples include: termination after filing a workers' compensation claim; termination after refusing to participate in an illegal price fixing scheme; termination after retaining an attorney to negotiate a claim against the employer. The courts will increasingly order an employee to be reinstated with backpay and award damages when a discharge has resulted in the violation of a clearly defined public policy.

In addition to the public policy exception, some courts have also found an exception based on the existence of an implied covenant of good faith in employment contracts. In these cases, courts have found an implied promise of the employer that it would not act arbitrarily in dealing with its employees, basically limiting the employer's right to dismiss except for "cause." The courts look to such facts as the length of the employee's service, the lack of any direct criticism of his work, and any assurances he received that his work was satisfactory.

The concept of employment-at-will concerns employees who have no property right to continued employment. However, the distinction between tenured and non-tenured personnel is irrelevant if school boards

are willing to offer the *Loudermill* protections to all employees. It is really a very livable standard. We are becoming a society that expects employers, in fairness, to inform all employees of the reasons why they are being discharged, and provide them with an opportunity to respond. Nothing more elaborate is required by *Loudermill*.

Unresolved Issues

Justice Brennan, in his partial concurring opinion, limited the Court's holding to employees who did not dispute the facts offered to support their discharges, but who had "plausible arguments to make that might have prevented their discharge."²⁶ Both Justices Brennan and Marshall would hold that due process would require more than the *Loudermill* "opportunity to respond" when there are "substantial disputes in testimonial evidence."²⁷ It remains uncertain what procedures will satisfy constitutional requirements when serious factual disputes exist or when an opportunity for a full post-termination hearing is lacking.

The Court stated: "the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."²⁸ With this minimal guidance from the Court, one cannot help but agree with Justice Rehnquist, who, as the sole dissenting vote, accused the majority of failing to provide useful standards and predicted future pretermination due process cases to resolve these issues.²⁹ But that is the nature of the flexible concept of due process, which depends on the facts in each case to determine what process is due.

26. 105 S. Ct. at 1494.

27. *Id.* at 1499.

28. *Id.* at 1495.

29. *Id.* at 1504.

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Schools, Technology, and the Law: Using VCRs in Educational Institutions

Virginia M. Helm

Introduction

"Only one thing is impossible for God: to find any sense in any copyright law on the planet."¹ We don't know what acquaintance Mark Twain had with the copyright law when he made that observation, but we do know that the law's ambiguities and omissions — whether deliberate or unintentional — have kept and will continue to keep legal scholars wrangling over its meaning and construction. A contemporary cynic not finding much "sense" in copyright law might explain the problem as the natural result of our pressure-sensitive politicians trying to balance and protect conflicting interests. The policy dimensions of copyright law, however, are beyond the scope of this chapter, which focuses on the legal uses of videotape recorders (VCRs) in educational institutions.

Definitions of "publicly" and "perform"

In order to understand precisely the legal and illegal uses of VCRs, we need to understand the statutory definitions of two words: "publicly" and "perform." Section 101 of the Copyright Act² states that to "perform" a work "means ... in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." In layperson's terms, one "performs" an audiovisual work merely by running it through the projector or recorder. And what is the significance of this definition of "performing"? Precisely that the right to publicly perform their works is one of the five exclusive rights of copyright proprietors.³ Since copyright

1. A. Paine, Mark Twain's Notebook 381 (1935), quoted in Ramey, *Off-the-Air Educational Videorecording and Fair Use: Achieving a Delicate Balance*, 10 J. C. & Univ. L. 346 (Winter 1983).

2. 17 U.S.C. §§ 101-810 (1976 & Cum. Supp. 1984).

3. Section 106 of the Copyrights Act gives copyright owners the exclusive rights to: (1) reproduce copies of their work; (2) prepare derivative works based on their copyrighted work; (3) distribute copies of their work by sale, rental, lease, or lending; (4) publicly perform their work (if it is a literary, musical, dramatic, choreographic work or a pantomime, motion picture or audiovisual work; and (5) publicly display their work (if it is a literary, musical, dramatic, choreographic, sculptural, graphic or pictorial work — including the individual images of a film — or a pantomime).

owners have the exclusive right to publicly perform their works, and the showing of a videotape constitutes a performance, the definition of "public" becomes central to the accessibility of videotapes, films, and other audiovisual materials.

Section 101 defines a public place as "a place open to the public" or "any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." This definition, obviously, makes it legal for individuals to show films and commercial videotapes in their homes or on their personal property. Without an exemption, however, educational and nonprofit institutions and organizations showing films, filmstrips, or commercial videotapes would have been in violation of the law. Fortunately, Congress did incorporate a special, if limited, exemption for schools.

Section 110 Exemption for Educators

Given the copyright-specific definitions of "publicly" and "perform," and given that the right to publicly perform their copyrighted works is the exclusive right of copyright owners, educators would have had to abandon use of nearly all of their commercially developed electronic audiovisual materials, if not the equipment itself, were it not for section 110. This provision contains an important exemption for educators by permitting:

- (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images is given by means of a copy that was not lawfully made ... and that the person responsible for the performance knew or had reason to believe was not lawfully made.

Several ambiguities in this provision are clarified in the house report⁴ which contains definitions and descriptions of several terms. Taken together, section 110(1) and the house report are understood to permit displaying/performing audiovisual works in nonprofit educational institutions under the following conditions:

1. They must be shown as part of the instructional program — not for entertainment, recreation, or even (unfortunately) for their intellectual or cultural value if unrelated to a specific teaching activity.
2. They must be shown by students, instructors or guest lecturers — not transmitted by TV (closed or open circuit) from an outside location.
3. They must be shown either in a classroom or other school location devoted to instruction such as a studio, workshop, library, gymnasium, or auditorium if it is used for instruction.

4. H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659-5823.

4. They must be shown either in a face-to-face setting or where students and teacher(s) are in the same building or general area.
5. They must be shown only to students and educators — not to outside groups or even mixed groups of students and community people.
6. They must be shown using a legitimate (i.e., not illegally reproduced) copy with the copyright notice included.

Commercial Videotapes: the "For Home Use Only" Warning

As if the new technology were not sufficiently intimidating in itself, educators and librarians who use commercial videotapes have been confronted with a label which reads: "**Warning 'For Home Use Only' Means Just That!**" Or the label may contain this stern admonition: "**Licensed only for non-commercial private exhibition in homes. Any public performance, other use, or copying is strictly prohibited.**" Or a school may have received a notice from the Motion Picture Association of America, informing media users that: "**[P]erformances in 'semi-public' places such as clubs, lodges, factories, summer camps, and schools are 'public performances' subject to copyright control.**"

Are these warnings legitimate, misleading or downright false? Are they binding? What are the implications of these warnings for classroom use and for library use? Copyright experts consider these labels misrepresentations of educator-users' rights and therefore not binding, at least not for all school situations. Their view is based on the section 110(1) rights of educators to display or perform works in face-to-face learning situations — a right that cannot be taken away by a label relying on semantic trickery.

The inclusion of schools in the list of semipublic places subject to copyright restrictions applicable to "public performances" *does not preclude use in classroom instruction*; rather it applies to a showing held on school property, perhaps on an evening or week-end, and open to the public for entertainment or for cultural or intellectual benefits. That prohibition is implicit by the qualifications attached to the face-to-face teaching exemption; but a public performance on school property is not the same as instructional activities limited to students. The effect of these warning labels is to confuse the two activities, with the result that educators and school media personnel may be misled into thinking that the restriction applies to the classroom or library when in fact it applies only to school showings open to the public or to showings for entertainment or non-instructional related activities for students.

School Libraries and Videotapes

What impact, if any, do warning labels have upon libraries and their uses of videotapes? Actually, the real and yet unanswered question is

whether libraries can legally allow users to view videotapes on equipment within the library itself. The library, after all, is a public place and while it may loan its videotapes to users to show in their homes, the viewing of library-owned videotapes on library equipment on library property could, under the most conservative construction of the copyright law, be problematic. The cause for concern here arises from a recent decision rendered by the Third Circuit Court of Appeals. In *Redd Horne, Inc.*⁵ the appellate court affirmed a lower court ruling that the seriatim viewings of individuals or small groups (no more than four viewers) in an establishment open to the public constituted a copyright infringement. This finding, held the court, "is fully supported by subsection (2) of the statutory definition of public performance" which delimits the transmission or other performance of a work "whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times."⁶ The court further substantiated its construction of the law on the basis of Congressional intent as interpreted by the leading copyright authority, Melville Nimmer. The applicability of this case for school or public libraries, however, is neither direct nor clear, because *Redd Horne, Inc.* involves a commercial profit-making establishment that is distinguished from a nonprofit educational institution in section 107, the fair use provision of the copyright law.

School libraries, in any event, can safely allow videotapes to be viewed by teachers or students to the extent that such viewing meets the conditions prescribed above, *viz.*, those pertaining to directly instructional purposes. Presumably this applies to viewings by individual or small groups of students as part of a class assignment or project. Other more generalized, random viewings in the library or media center which are not directly related to instruction may be questionable, unless of course the media specialist or other school personnel obtains permission through license or contract to so use its videotapes.

The *loaning* of videotapes by libraries to users for use in their own homes poses no legal problems; libraries retain the right first granted by the 1909 copyright act to all owners of legal copies, *i.e.*, the right to sell, *loan* or otherwise dispose of their copies.

The *reproduction* of videotapes by libraries, on the other hand, is limited by restrictions in section 108 which also pertain to other audiovisual works. The protections granted to visual and audiovisual works in this provision are somewhat greater than those provided for written works. Specifically, a library may reproduce and/or distribute audiovisual works (motion pictures, videotapes, etc.) for only two reasons: (1) to replace a published work that is lost, stolen, damaged or deteriorating if it cannot be replaced by an unused copy at a fair price and (2) for an unpublished work, for "preservation and security or for deposit for

5. *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (1984).

6. *Id.* at 159.

research use in another library. . . . With the exception of audiovisual news programs, which may be reproduced and distributed in limited quantities, libraries are limited to duplicating a *single copy* of an audiovisual work for another library. In all cases, however, the reproductions of audiovisual works must meet three statutory conditions: 1) there must be no intent to gain financial advantage, 2) the library must be open to the public or, if it is a specialized research library, it must be open to non-affiliated researchers, and (3) notice of copyright must be included in the copies.

Videotaping Educational Broadcasts Off-the-Air

Both commercial and public broadcasting corporations produce educationally valuable television programs and increasing numbers of educators are trying to incorporate into their own classroom curriculum videotaped copies of these programs. Is it legal to videotape copyrighted television programs and show them later in a classroom or school library or auditorium? Does it matter whether the program was broadcast by a commercial or a public station? Can schools build libraries of videotaped television programs?

Guidelines for Off-the-Air Recording of Broadcast Programming for Educational Purposes

The answers to most of these questions are contained in the "Guidelines for Off-the-Air Recording of Broadcast Programming for Educational Purposes" (hereafter, "Guidelines for Off-the-Air Recording"). Ratified in 1981 by the House Subcommittee on the Courts, Civil Liberties, and the Administration of Justice, these guidelines are considered part of the (retroactive) legislative history of the 1976 Copyright Act; though they do not have the force of law, they can be expected to serve as primary criteria for courts assessing "fair use" in any future cases involving off-air videotaping for educational purposes.

Although there are a number of restrictions placed upon the use of videotaped television programs, the two most essential limitations include:

1. Retention of videotaped recordings for no more than *45 calendar days* after the recording date, at which time the tapes must be erased.
2. Showing of videotaped recordings to students only within the *first 10 school days* of the 45-day retention period.

Additional restrictions which must be followed include:

3. Making off-air recordings *only* at the request of an individual teacher for *instructional* purposes — not by school media staff in anticipation of later requests by teachers.
4. Showing the recordings to students no more than two times during

the 10-day period, and the second time only for necessary instructional reinforcement.

5. Allowing the taped recordings to be viewed after the 10-day period only by teachers for evaluation purposes, i.e., to determine whether or not to include the broadcast program in the curriculum in the future.
6. Making duplicate copies of a broadcast program only if several teachers request videotaping of the same program, and using all duplicate copies, of course, in compliance with the restrictions applicable to the original recording.
7. Not physically or electronically altering an off-air recording nor combining it with others to form anthologies; showing or using the recording in its entirety, however, is not required.
8. Including the copyright notice on all copies of off-air recordings.
9. Applicability of these guidelines only to *nonprofit educational institutions*, which are further "expected to establish appropriate control procedures to maintain the integrity of these guidelines."

These guidelines apply to all commercial television broadcasts and to some public broadcasting. Several of the major public broadcasting corporations⁷, however, also drew up a joint policy statement prior to the enactment of the 1976 Copyright Act. Like the "Guidelines for Off-the-Air Recording," these do not have the legal status of enacted legislation but are considered minimum guidelines for fair use copying of public broadcasting programs.

Public Broadcasting Service Taping Guidelines

Designed specifically and only for schools, the public broadcasting guidelines are similar to the off-air guidelines for commercial broadcasts in that the recordings must be requested by teachers and shown only to students and faculty for instructional purposes on the school property. They differ from the commercial broadcasting off-air guidelines by (1) specifying that the educational institutions be accredited, and (2) not restricting the showings to the students for the class taught by the requesting teacher. Presumably, a teacher could request the taping of a public broadcast program and show the recording to the entire school provided that it served instructional rather than entertainment purposes. Finally, these recordings may be retained for only seven days unless otherwise authorized in writing in advance, though the number of showings is not limited.

Educators who wish to expand their rights to tape and show television programs to their students, however, should be aware of several additional and important considerations. They do, for example, have other options besides following the restrictive guidelines or assuming any

7. Public Broadcasting Service, Public Television Library, Great Plains National Instructional Television Library, and Agency for Instructional Television.

risks of not following them legalistically. First, educators must be aware that both sets of guidelines for off-air taping are *operative in the absence of licensing agreements* which themselves may be either more or less restrictive than the guidelines. This consideration requires someone in the school district, most often the media specialist, to be familiar with any audiovisual licensing agreements applicable to their holdings. Second, when educators wish to expand their use of a particular broadcast program or series, they may write to the copyright holding broadcast corporation for permission — and, if given permission, usually pay a fortune. Third, they can sign a licensing agreement with the Television Licensing Center⁸, a commercial enterprise which negotiates agreements with the broadcasting companies and then makes available to schools the videotaped copies of the programs for a fee much lower than any school could individually negotiate with the broadcasting corporations themselves. Finally, there is the matter of fair use mentioned above. Informed educators who understand the fair use concept are in a better position to assess the legality of any actual or proposed uses of audiovisual materials not specifically covered by the copyright law.

Applying Fair Use Criteria to Videotaping Off-the-Air: BOCES and Sony

Before examining recent case law applying fair use to off-the-air recording, we should briefly review the fair use concept and criteria. Fair use is a judicial doctrine dating back to an 1841 decision⁹ and first codified in the 1976 copyright revisions. It is intended to help the courts balance the interests of copyright owners and the interests of the public in obtaining at least limited access to copyrighted works. Educators are the prime beneficiaries of this provision, though limited use of copyrighted works is also made available to news reporters and media critics. In spite of four specific factors used for over a century, the doctrine has proven elusive in application and at least one author has written that the "courts have never applied the fair use doctrine with any predictability"¹⁰. The inherent difficulty of applying the fair use factors has only been exacerbated by the speed of technological development in the last several decades, resulting in the ability to copy, send, perform and otherwise use copyrighted works with little effort, time or money.

What are the four fair use factors? Section 107 of the Copyright Act lists them as follows:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

8. Television Licensing Center, 733 Green Bay Road, Wilmette, Ill. 60091

9. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

10. Note, *Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era*, 96 Harv. L. Rev. 450 (1982).

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

One reason for the inconsistency of the application of these factors is that while the courts are to weight all four factors in their deliberations, how much they weight any given factor is left entirely to their discretion.

The two major cases pertaining to videotaping off-the-air have both considered the fair use question. *Encyclopedia Britannica Educational Corporation v. Crooks*¹¹, commonly known to educators as the *BOCES* case, involved taping off-the-air by an intermediate level state education agency. *Sony Corporation v. Universal City Studios, Inc.*¹², familiarly known as the *Betamax* case, involved, among other things, taping off-the-air by individuals in their homes. Its relevance for educators lies primarily in its analysis of fair use.

While the four fair use factors have not previously been accorded consistent weightings by the courts, it is possible that the Supreme Court's weightings in the *Betamax* case may set more firmly the recent trend to weight the first and fourth fair use factors most heavily. In applying the factors pertaining to the character and purpose of the use and the potential effect on the market value of the copyrighted work, the Court reiterated a legal principle found in a number of preceding lower court decisions, i.e., commercial use is an infringement but "non-commercial uses are a different matter." In holding that the noncommercial, nonprofit character of off-air taping in the home led to a presumption of fair use, the Court necessarily reduced the significance of factors two and three (the nature of the copyrighted work and the extent of the copying). In fact, because the timeshifting involved in home videotaping for later viewing "merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge," the Supreme Court held that "the fact that the entire work is reproduced... does not have its ordinary effect of militating against a finding of fair use."

What applicability does *Sony* have for educators? It may have some bearing on the question concerning the legality of a teacher videotaping a television program at home and later showing it in the classroom. First, it has affirmed the right of individuals, including teachers, to tape a program at home. Second, the four dissenting justices who objected to off-air taping in the home as an "ordinary" use, made it clear that a "productive" use such as the use in scholarship, research or teaching [emphasis added], was more likely to be found a fair use in the absence of a negative effect on the potential market for the copyrighted work. This

11. 542 F. Supp. 1156 (W.D.N.Y. 1982), 558 F. Supp. 1247 (W.D.N.Y. 1983).

12. 104 S. Ct. 774 (1984).

perspective, considered with the more lenient majority position and the "Guidelines for Off-the-Air Recording," should give us reason to believe that educators who bring home-taped programs into the classroom are within a "safe harbor" at least as long as they abide by the "Guidelines" in their showing and retention of the videotaped recordings. Whether they may legally retain the taped programs over a period of months or years to show repeatedly is another matter. A strict construction would certainly advise against such activity as a violation of the rights being protected by the "Guidelines for Off-the-Air Recording." A more liberal, "realistic" application would emphasize the minimal harm done to the copyright owner and the minimal likelihood of copyright owners seeking out and pressing charges against the occasional educator taking the trouble to tape a program at home and incorporate it into the classroom curriculum. However, at this point we would be well-advised to remember the other options available to educators as described earlier.

If *Sony* has only limited relevance for educators interested in recording television broadcasts off-the-air, *Crooks* has direct bearing and provides several criteria for assessing the legality of off-air taping. Familiarly known to educators as BOCES—the acronym for the defendant intermediate level state education agency (Board of Cooperative Educational Services)—this case was brought by Encyclopedia Britannica to put an end to the agency's practice of videotaping off-the-air the plaintiff's educational programs which were retained and then duplicated for local school districts at their request.

After years of judicial entanglement, the court ruled in 1982 and 1983 that the agency violated copyright law by its large scale, systematic off-air videotaping of broadcast programs, duplication and retention of those copies, and distribution to all schools in its service region a copy of any master tape upon request. Although the board was a nonprofit agency, serving schools with purely educational videotaped films, the court held that this activity did not constitute a fair use. Central to its reasoning was the extensiveness of the copying (10,000 copies to local schools in 1976) and the obvious commercial harm to the plaintiff which made available copies of the programs through its own leasing arrangements. The schools chose to obtain their videotaped programs from BOCES rather than Encyclopedia Britannica, of course, because of a drastic difference in cost—Encyclopedia Britannica charging what was regarded as prohibitively expensive fees while BOCES required only that the school send a blank videotape on which to copy the requested program. The ready availability of the taped programs from the copyright owner, however, and the harm done to it by way of lost profits, left the defendant educational agency without a convincing fair use argument.

As a result of the BOCES decision, educational institutions or agencies now (should) know that they may engage in short-term, intermittent off-the-air videotaping following the federal guidelines, but they may not engage in long-term, systematic, large-scale taping. From the

"Guidelines for Off-the-Air Recording" it is also obvious that, absent a license or other permission, schools may not build library collections of videotapes of television programs. Carried one step further, this line of reasoning raises serious questions about the legality of teachers maintaining a personal library of videotapes made in their homes but used regularly and repeatedly in their classrooms.

Summary

The restrictions imposed by most laws tend to be regarded as either too vague or too detailed, or both. The copyright law is no exception. Videotape recorders for home use had barely arrived on the market at the time of the 1976 revisions and so the law contains no specific provisions pertaining to the complex questions raised in connection with recording off-the-air¹³. The "Guidelines for Off-the-Air Recording" developed for the educational setting by affected interest groups certainly provide specificity, though educators generally regard them as overly restrictive and counterproductive to the educational enterprise. Section 108 does permit libraries to make and distribute duplicate copies of audiovisual news programs as long as they acquire no "direct or indirect commercial advantage."

The use of commercially produced videotapes for instructional purposes is governed by section 110 of the Copyright Act, which applies to all audiovisual materials and primarily limits their use to specifically curriculum-related activities for students on school property. The right to use commercial videotapes in compliance with section 110 is not diminished or abrogated by any "For Home Use Only" warning labels affixed by producers or distributors to the videotapes. Finally, commercial videotapes, like all other copyrighted works, are subject to the broad prohibitions against unauthorized copying and/or distribution, with certain limited exceptions granted to libraries unable to replace damaged or lost works at a reasonable price.

While there are numerous ambiguities still to be clarified either by Congress or by the courts, perhaps the most problematic question pertains to the right of libraries in general and school libraries in particular to allow users to view videotapes on the library premises. Although viewing videotapes in school libraries in compliance with the section 110 exemption for schools is permitted, broader uses may be questionable in light of the *Redd Horne* construction of the term "publicly." Educators might hope that the courts would distinguish between a *Redd Horne*-type commercial venture and a nonprofit educational enterprise in considering *seriatim* viewings to individuals or small groups as "public" showings — but at this point, that hope has yet to materialize.

13. Live secondary transmissions of television broadcasts are dealt with in § 110-110(2); transmissions are not recordings and as such are not discussed in this chapter.

One last, and certainly not least, consideration for educators is to bear in mind that for all the emphasis on statutory and case law in this and other discussions of copyright, many technological uses of copyrighted works are governed by licensing agreements. Therefore, it is imperative that educators in general, and perhaps school media specialists or other school officials responsible for purchasing audiovisual materials in particular, know about the existence and substance of any licensing agreements accompanying the technological "software" used in their schools. In order for educators to obtain this knowledge, it is suggested that school boards and administrators initiate the procedures for informing their educational employees about both applicable licensing agreements and copyright restrictions pertaining to the use of all copyrighted works used in their schools.

3

Censorship: Post Pico

John David Terry, II

In *Pico v. Island Trees Union Free School District*,¹ the Supreme Court addressed the issue of whether the first amendment imposed limitations upon a school board's discretion to remove books from a school library.

The board members in *Pico* received a list of books at a politically-conservative conference; the list characterized the books as anti-American, anti-Christian, anti-Semitic, and just plain filthy. The board ordered the superintendent to remove the books from the district's libraries that were on the list. The superintendent objected to the board's directive, indicating that the board had already established a policy on this issue that the superintendent felt should be followed. (Note: Under this policy, the board was to appoint a committee, the committee was to study the issues and make recommendations to the board.) The board noted the superintendent's objections but insisted on the immediate removal of the books from the libraries.

In a plurality decision, the United States Supreme Court held there are limits to the discretion of school boards to remove books from their libraries.² In the court's view, school boards retain the right to remove books if they are educationally unsuitable, providing the decision of unsuitability was not decisively based upon the board's desire to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. The court said:

If the [school board] intended by their removal decision to deny respondent's access to ideas with which [they] disagreed; and if this intent was the decisive factor in the board's decision, then the board [has] exercised their discretion in violation of the constitution.³

By decisive factor, the Court meant a substantial factor in the absence of which the opposite decision would have been reached. Since the Court felt the record was not clear on the decisive factor issue, the Court remanded the case to the district court for a trial. A legitimate question might be raised on the propriety of the Court remanding this case back

1. 457 U.S. 833 (1982).

2. Schimmel, *The Limits on School Board Discretion: Board of Education v. Pico*, 6 Educ. L. Rep. 285, 295 (1982).

3. 457 U.S. at 871.

to the district court on the issue of the board's motivation when there was substantial agreement by the parties that:

the board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students. (Emphasis added) 474 F. Supp. 387, 392 (1979)

The plurality, after making an independent examination of the whole record,⁴ appeared to be persuaded by the fact that the removal proceedings were irregular and ad hoc.⁵ The Court stated:

The state must employ "sensitive tools" in order to achieve a precision of regulation that avoids the chilling of protected activities... [T]he presence of such sensitive tools in [the board's] decision-making process would naturally indicate a concern on their part for the First Amendment rights of respondents, the absence of such tools might suggest a lack of such concern.⁶

The Court concluded that the board's failure to follow established procedures for book removals created a suspicion and genuine issue of a material fact (the board's motivation for the removal) which required the case to be remanded back to the district court for trial.

Many cases have relied on *Pico* as the case governing the rule for summary judgement.⁷

4. Federal courts, when dealing with first amendment rights, are required to make an independent examination of the record to insure that the lower court's judgment does not constitute a forbidden intrusion on the field of free expression. *Rose Corp. v. Consumer's Union of U.S., Inc.*, 104 S. Ct. 1949 (1984); *Grove v. Moud School Dist.* No. 354, 753 F.2d 1528 (9th Cir. 1985) illustrates the concept. In *Grove*, the parents sought the removal of *The Learning Tree* by Gordon Parks from their daughter's English literature course on religious grounds. Concurring in the decision to deny the parents' first amendment claim, Judge Canby stated:

We must remain sensitive to claims that government is either interfering with a religion or is supporting a competing religion. See *Cowley v. Southwestern Institution*, 636 F.2d at 743. Neither is the case here. On the contrary, if we were to grant the relief sought by plaintiffs and remove *The Learning Tree* from the curriculum because of plaintiffs' hostility to its ideas, our action would itself threaten first amendment values. "Our Constitution does not permit the official suppression of ideas." *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (Brennan, J.) (plurality opin.). We are bound to respect that command as well.

5. Thomas, *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, *Interpretation and Projection*, 6 Educ. L. Rep. 277, 279 (1982).

6. 457 U.S. 874 n.26.

7. *Wood v. City of Dayton, Ohio*, 574 F. Supp. 689, 692 (S.D. Ohio 1983); *Akin v. General Motors Corp.*, 573 F. Supp. 1188, 1191 (S.D. Ohio 1983); *Elam v. Montgomery County*, 573 F. Supp. 797, 801 (S.D. Ohio 1983); *Podlaski v. Airborne Express, Inc.*, 550 F. Supp. 906, 908 (S.D. Ohio 1982); *Sommer v. City of Dayton, Ohio*, 556 F. Supp. 427, 429 (S.D. Ohio 1982); *Daily Herald v. Munro*, 758 F.2d 350, 352 (9th Cir. 1984); *Kunick v. County of Santa Clara*, 699 F.2d 1345 (9th Cir. 1982).

Other courts have cited *Pico* in their analysis of equal access and other first amendment religious questions.⁸ The religious questions posed in these cases are beyond the scope of this article. This article focuses on the impact that *Pico* has had on subsequent decisions. The reader must be careful not to ascribe too much value to *Pico* as a precedent, since it was a plurality decision. In *Muir v. Alabama Educational Television Commission*,⁹ the court decided that the *Pico* case does not take precedence over the first amendment issues presented in the case.¹⁰

The *Muir* case is a good place to begin reviewing the post-*Pico* cases, because it exemplifies the difficulty courts have had in trying to decide what *Pico* had as its major premise. The courts have held that *Pico* stands for either (1) the concept of a limited open forum, or (2) the concept that government, when performing certain "special functions," may make discriminatory choices between various ideas, or (3) the concept that government, when performing certain "special functions," may make discriminatory choices between various ideas as long as those choices are not decisively based on a determination of what is orthodox in politics, nationalism, religion, or other matters of opinion.

In *Muir v. Alabama Educational Television*, the court addressed the novel issue of whether individual viewers of a public television station have a first amendment right to compel the station to broadcast a previously-scheduled program which the station had decided to cancel. The case arose when the Alabama Educational Television Commission (AETC) decided not to air *Death of a Princess* which had been scheduled for broadcast in May of 1980. The program was one of thirteen in the series *World*. The program dramatized the investigation of the circumstances surrounding the execution of a Saudi Arabian princess and her commoner lover for adultery.

The plaintiffs, while conceding that AETC has some editorial discretion in operating the television station, argued that the discretion to cancel a previously-scheduled program could not be based upon the political content of that program. The plaintiffs cited *Pico* for the proposition that program restrictions based upon their political content are presumptively unconstitutional.¹¹ In distinguishing *Pico*, the court held that school libraries are distinguishable from a broadcast station. The court observed that (1) the maintenance of one book on a library shelf does not (absent space limitations) preempt other existing books, whereas in broadcasting there can be only one transmission at one time; (2) there is no counterpart vis-a-vis libraries to the Federal Communication Commission's Fairness Doctrine; and (3) the right to cancel a program is far more integral to a television station than the decision to

8. *Bender v. Williamsport Area School Dist.*, 741 F.2d 558 (3rd Cir. 1984); *Bell v. Little Axe Indep. School Dist. No. 79*, 766 F.2d 1391 (10th Cir. 1985); *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1984).

9. 688 F.2d 1033 (10th Cir. 1982).

10. *Id.* at 1045.

11. *Id.* at 1044.

remove a library book, since there are few legitimate reasons to remove a book, once acquired.¹² The court then concluded that the decision to cancel *Death of a Princess* could not properly be characterized as censorship.¹³

In the concurring decision, Judge Rubin observed:

The sensitive and important issues in this case cannot be resolved simply by attempting to decide whether a [public] television station... is, or is not a public forum. That term is but a label, developed to describe a location, the use of which is open to the public. It does not express a definition, but a conclusion.

For Rubin, the issue in the case to be decided was:

whether an individual viewer has a right to compel a television station operated by a state agency to broadcast a single program previously scheduled by an employee of the agency, that a higher ranking... official has decided, because of its content, to cancel.¹⁴

This issue apparently drove at the crucial issue of: How does the first amendment control the state when the state is operating a television station? In addressing this issue, Rubin indicated that all of the opinions in *Pico*¹⁵ either implicitly or expressly recognized the distinction between the application of the first amendment to limitations on the use of a public forum *and* the restrictions it may impose on governmental action in conducting a particular activity.¹⁶ In Rubin's view:

Pico seemed to endorse the view that the nature of the activity determines the strictures of the first amendment places on government action.¹⁷

When the state's action is devoted to a specific function, rather than general new dissemination or the free exposition of ideas, the state may regulate content so that its specific function is not impaired.¹⁸

Judge Kratch dissented because he felt that any government decision to withdraw a program is presumed to be unconstitutional if the decision was made "on the basis of substantive content *with the intent to restrict access to political ideas or social perspectives*."¹⁹

The final dissenting judge in *Muir* was of the view that allegations or censorship in a public television station were entitled to greater scrutiny than allegations involving a school's regulation of students' reading

12. *Pico v. Board of Educ.*, 638 F.2d 404, 436 (2nd Cir. 1980).

13. 688 F.2d at 1046-47.

14. *Id.* 1048.

15. 457 U.S. 853 (1982).

16. *Id.* 1051.

17. *Id.* 1052.

18. *Id.* 1049.

19. *Id.* 1053.

material.²⁰ Thus, under *Pico*, he would have found a constitutional violation.

In *Olsen v. State Board of Community Colleges*,²¹ the student body terminated the funding for a student newspaper that was approved by the college's governing body. Olsen was the faculty advisor to the newspaper. She was responsible for the monitoring of the printing costs, the advertising revenue resulting from the publication of the paper, and the review of articles for libelous or obscene material. Exclusive of these functions, Olsen did not exercise any control over the content of the newspaper. The student body terminated the funding for the paper because:

[the paper was] always down on the school and they never printed any happy news. The [paper] drug out subjects that really did not need to be drawn into depth... [The paper] just kept saying the same things over and over, and that there were some misquotes in the paper.²²

The court, in rejecting Olsen's claimed first amendment right to be the faculty advisor for the newspaper, relied upon *Pico* for the proposition that the decision of the school "as to what subjects will be taught and what resources will be available to the teacher must be made in a manner that comports with the transcendent imperatives of the first amendment." The court observed that the administration of a school, at whatever level, in the educational continuum involves a constant process of selection and winnowing based not only on educational needs, but also on the financial resources of the school. Therefore, the official responsible for directing an educational program must be allowed to decide how the limited resources of an institution can be best used to achieve the goals of educating students. That decision will invariably involve the acceptance or rejection of some values over others. Therefore, the court held that under the circumstances, Olsen's right to teach did not encompass a constitutionally-protected interest in the publication of the newspaper as an instructional instrument. The court in *Daly v. Sprague*,²³ dealt with another employee's first amendment claim. There a doctor of a public hospital had his clinical privileges removed for intending to speak and associate with his patients. The court held that the doctor's rights were clearly subsumed within and subservient to the regulations of the state hospital governing medical practitioners. The court cited *Pico* for the position that courts should not interfere in the resolution of conflicts that arise in the daily operation of school systems unless basic constitutional values are directly and sharply implicated. The court said the same considerations appear to apply to the University Medical Center in view of the state's extensive authority to regulate the practice of medicine.

20. *Id.* 1058.

21. 753 P.2d 1531 (Colo. 1984).

22. *Id.* at 1534.

23. 742 F.2d 896.

The *Olsen* and *Daly* cases, when taken together, seem to stand for the view that plaintiffs suing a governmental entity, absent a public forum analysis, will have difficulty in overcoming the discretion vested in governmental officials when they are conducting the operations of special governmental functions.²⁴ Other cases recognizing *Pico* for this purpose are: *Logan v. Warren County Board of Education*,²⁵ *Whittenberg v. School District of Greenville County*,²⁶ *Bell v. Little Arc Independent School District No. 79*,²⁷ and *Fraser v. Bethel School District No. 403*.²⁸

The *Fraser* case is interesting because the court seems to have inferred a limited open forum in an assembly in which a student gave a sexually-suggestive campaign speech. The school district in *Fraser*, taking action to correct what it felt was a disruptive situation, relied upon *Pico* for the proposition that the courts would not be involved in the case because basic constitutional values were not directly and sharply indicated. The district apparently impressed the dissent with this argument,²⁹ but not the majority. The majority said:

The Bethel School District's reliance on [*Pico*] is misplaced because, as Justice Brennan said speaking for the plurality, school boards may not "extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." A voluntary student election assembly is even further removed from the "compulsory environment of the classroom" than a library.³⁰

24. The *Bender* case implicitly suggests that when an open forum of some nature exists, the government must assume the responsibility to explain its exclusion of a qualified group or idea. For an idea or group to be qualified, it must fall within the objective parameters that the government has established for the particular public forum. If the idea or group meets the previously established criteria, then the idea or group cannot be constitutionally excluded, unless it is decisively inconsistent with the special mission and/or function of the government. See *Bender* at 741 F.2d at 546.

If there is validity to the *Bender* analysis, then the Island Trees Union Free School District lost its discretion to inculcate community values when the students left "the compulsory environment of the classroom" and went into the library which was completely voluntary in terms of attendance and inquiry. See 457 U.S. 469. From a constitutional standpoint making government adhere to the strictures of the first amendment once a limited open forum is found is quite consistent with the special purposes for which a high school is intended — the preparation of youths for adult life and adult decisions. 741 F.2d at 549.

25. 549 F. Supp. 145, 149 (S.D. Ga. 1982) (local authorities vested with broad discretion in the management of school affairs).

26. 607 F. Supp. 289, 302 (D.S.C. 1985).

27. 766 F.2d 1391 (10th Cir. 1985) (inferring discretion from the special mission of a high school to inculcate fundamental values necessary to the maintenance of a democratic political system).

28. 755 F.2d 1356 (9th Cir. 1985) (schools have discretion to control the content of the school curriculum).

29. *Id.* at 1366.

30. 457 U.S. at 869.

The court had previously stated:

The assembly, which was run by a student, was a voluntary activity in which students were invited to give their own speeches, not speeches prescribed by school authorities as part of the educational program. Attendance, moreover, was not compulsory; students were free to attend a study hall instead.³¹

Clearly, *Pico* and *Fraser* can be analyzed under the limited open forum analysis articulated by *Bender v. Williamsport Area School District*. The *Bender* case, while citing *Pico* for the proposition that the secondary schools are permitted to inculcate fundamental values necessary to maintain a democratic political system,³² recognized that schools could create limited open forums within their curriculums. The court said:

The best indication of the accommodation afforded ... to the students comes from the school district's own description of the activity period in which he states that "any student activity or club which is considered to contribute to the intellectual, physical or social development of the students" would be likely approved.

....
Thus, the latitude allowed to student groups, and the manner in which it encourages student groups to exercise independent judgement, supports the conclusion that Williamsport Area School District did indeed create a forum — albeit a limited one — restricted to high school students at Williamsport and also restricted to the extent the proposed activity promoted the intellectual, physical or social development of the students.³³ (Emphasis by the court)

Another example of an open forum existed in *Kulhmeir v. Hazelwood School District*.³⁴ In this case, the school decided not to publish articles written for the student newspaper. The articles included stories on

teenage pregnancy, personal accounts of three pregnant Hazelwood East students, the causes of divorce, the difficulties of teenage marriage, the reasons why teenagers run away from home, and the proposed federal regulation requiring parents of minors to be notified if the minor receives birth control devices from a federally-funded clinic.

The students sued, alleging that:

defendants' negligent, willful, and intentional acts, policies and omissions violated plaintiffs' first and fourteenth amendment rights to freedom of speech, freedom of expression and freedom of press.

31. 755 F.2d at 1364.

32. 741 F.2d at 548.

33. *Id.* at 549.

34. 578 F. Supp. 1288 (E.D. Mo. 1984).

The school relied on *Pico* for the proposition that if the student newspaper was part of the school's curriculum, then the school had the absolute discretion to remove the articles from the newspaper. The court disagreed with the school for two reasons. First, the court found that since the plaintiffs had alleged in their complaint that the school newspaper was an adjunct to the school's curriculum, it could be assumed, after construing the complaint most favorably to plaintiff, that the paper was a public forum rather than an integral part of the school's curriculum.³⁵

Second, the court rejected the school's argument that if the paper was a part of the curriculum, the first amendment values could not be implicated. The court indicated that even though *Pico* allows for discretion, there are limits to that discretion. Therefore, the court did not dismiss the case and ordered further proceedings to determine if the first amendment had been violated.

In *Cinevision Corp. v. City of Burbank*,³⁶ the allegation was that entertainers were denied access to a public forum, in violation of the first amendment, on the basis of their expression and other arbitrary factors. The city disapproved of a "hard rock" concert that was being proposed since it had the authority to reject any proposals that had "the potential of creating a public nuisance or ... would violate state law or city ordinance." The court, citing *Pico*, said the city standard did not meet the requirements of the first amendment. The city council's objection to the hard rock concert centered on the content of the music which it wanted to exclude from the Starlight Bowl. The council argued it had the discretion to inculcate the proper community values in its youth by presenting family entertainment. The court indicated that the desire to inculcate Americanism or proper community values in its youth cannot justify Burbank's efforts to ban hard rock music from the Starlight Bowl. The first amendment limits the government efforts to inculcate values, at least when such efforts serve to suppress or stifle other forms of protected expression.³⁷

Similarly, in speaking of the governmental responsibility that goes with inculcating values, the concurring opinion by Justice Marshall in *New Jersey v. T.L.O.*,³⁸ stated:

It would be incongruous and futile to charge teachers with the task of imbuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those teachers from the need to respect constitutional protection.³⁹

....

35. *Id.* at 1286.

36. 745 F.2d 560 (9th Cir. 1984).

37. *Pico*, 457 U.S. at 872.

38. 105 S. Ct. 733 (1985).

39. *Id.* at 864-865.

Schools are places where we inculcate the values essential to meaningful exercise of rights and responsibilities by a self-governing citizenry. *Pico v. Island Trees Union Free School District*.⁴⁰

There are many post-*Pico* decisions dealing with a variety of issues. Many of those cases are grouped below under subjects addressed in the *Pico* decision.

Decisive Factor Test — In *Games v. Fair*,⁴¹ a prisoner wrote sexually explicit poems to a female staff member at the prison. When he was reclassified to a different section of the prison, he sued. The court in holding there was no evidence to show the inmate was reclassified as a result of the prison's desire to thwart or limit the inmate's right to write poetry, cited *Pico* for the proposition that the inmate would have to show that intent to deny him access to free expression, rather than prison discipline, was the decisive factor for his reclassification.⁴²

Ad hoc procedures as a basis for suspicion — The court in *AREO Corp. v. Department of the Navy*,⁴³ felt that a suspicion existed as to the Navy's motivations when the Navy, contrary to normal practices, had "[not] yet [sic] explained why the onsite team was given only a few days to prepare a competitive package or how and why the dissent and criticisms were ultimately resolved the way they were."

Impermissible discrimination among ideas based on Blackmun's concurring opinion — There was one case, *White House Vigil v. Clark*,⁴⁴ which cited the Blackmun rule as the test.

Recipient's right to receive ideas — There were two cases in this area. The first was *Belcher v. Mansi*,⁴⁵ where the plaintiff sought to tape record the committee meetings of the governing body where taping was prohibited without the governing body's consent. The plaintiff asserted the rights of the listener to enhance his comprehension by the means of recording the public meeting. The court said plaintiff's contention was grounded in the right to know and right of access cases like *Pico*. The court said it need not resolve these arcane issues, because the case could be decided upon the Rhode Island statutes governing open public meetings.

The second case, *American Future Systems v. Pennsylvania*,⁴⁶ cited *Pico* for the position that where there is constitutionally-protected free speech, "the protection afforded is to the communication, to its source, and to its recipient's both."

40. *Id.* at 876, 880.

41. 738 F.2d 517, 527-528 (1st Cir. 1984).

42. *Summat v. Manson*, 554 F. Supp. 1363, at 1373 (D. Conn. 1983) (for the same proposition).

43. 558 F. Supp. 404, 422 (D.D.C. 1983).

44. 746 F.2d 1518 (D.C. Cir. 1984).

45. 569 F. Supp. 379, 382 (D.R.I. 1983).

46. 568 F. Supp. 666, 670 (M.D. Penn. 1983).

Summary and Conclusions

The *Pico* case and cases in its aftermath are still waging an ideological war between degrees of two competing positions. On the one hand, one has the first amendment and an open society. On the other hand, one has government constantly expanding and dividing itself into special purposes and being vested with almost absolute discretion to find the efficiencies to achieve its ends. Those arguing in favor of the first amendment recognize that it has been described as the indispensable condition of nearly every other form of freedom.⁴⁷ The cases upholding the first amendment seem to emphasize two prominent themes: (1) the function of freedom of speech in individual self-expression and the development of individual potential, and (2) the value of freedom of expression in our representative democracy and system of self-government.⁴⁸

Those in favor of government performing its specialized functions are in favor of absolute discretion because the realities dictate discriminating choices so that the primary mission of the government will not be disrupted.⁴⁹

The limited open forum cases allow courts to invade these special purpose governmental entities so that the first amendment can survive, given the changing nature of the way the government operates.

After reviewing the cases, this writer concludes that *Pico* seems to be another one of the cases in the never-ending battle of trying to find the proper balance between the first amendment and the efficiencies of government.

47. *Palko v. Connecticut*, 302 U.S. 319, (1937).

48. See Gunther, *Constitutional Law* 1044 (1975).

49. See e.g., *Spock v. Greer*, 424 U.S. 828 (1976); *Jones v. North Carolina Prisoner's Labor Union, Inc.*, 433 U.S. 119 (1977); *Lehman v. City of Shaker Heights*, 488 U.S. 298 (1974).

4

Plagiarism and Cheating

Ralph D. Mawdsley
Steve Permuth

The problems of plagiarism and cheating can be identified as academic dishonesty and represent significant policy concerns to all levels of education, including higher education. These problems not only reflect on the integrity of student work which is the product of plagiarism or cheating but also reflect upon the academic reputation of an institution which is unable to detect violators or is unwilling to pursue appropriate disciplinary action.

In dealing with academic dishonesty cases there are several important concerns: whether violations will be treated as academic or disciplinary matters, or both; whether the students adequately understood the institution's or faculty member's definition of plagiarism or cheating; and whether the institution or its faculty members could be liable for student published works prepared as course assignments and therefore violative of copyright law. Some of the legal issues raised in academic dishonesty cases include: (1) relevance of intent to plagiarize or cheat; (2) notice of the charges; (3) right to counsel; (4) cross-examination; (5) right to a hearing; (6) reasons for discharge; and (7) necessity of an appeal process.

The Role of Intent in Academic Dishonesty Cases

The role of intent became the central issue in the leading case of *Napolitano v. Princeton University Trustee*.¹ Plaintiff Napolitano was a Princeton senior English major who was anticipating attending law school. During her four years at the university Napolitano had maintained a 3.7 out of 4.0 grade point average, despite devoting long hours to managing the men's baseball and women's basketball teams.² During the first semester of her senior year plaintiff elected to take a course entitled "The Spanish American Novel," not to satisfy credits for her degree but "merely to become more familiar with Spanish literature."³ One of the course requirements was a critical analysis term paper

1. 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982), *aff'd* 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982).

2. *Education: Questioning Campus Discipline*, Time Magazine, May 31, 1982, at 58.

3. 453 A.2d at 280.

written in Spanish on a topic chosen by the student but to be approved by the Professor (Sylvia Malloy). Because of time constraints in pursuing other academic requirements, plaintiff did not seek approval of her topic until December 16, 1981, less than a month before the final due date for the paper, January 13, 1982. Professor Malloy suggested that plaintiff read a book which had been placed on library reserve at the beginning of the fall semester.

On or about January 21, 1982, when Professor Malloy began to grade plaintiff's paper she "sensed there was something" and wrote "Is this yours?" in Spanish, on the margin.⁴ Upon completing her review of plaintiff's paper, the professor contacted Dean Peter Onek, an Assistant Dean of Student Affairs at Princeton, who advised that plaintiff be awarded a grade of "Incomplete" and that a letter formalizing the charges of plagiarism⁵ be sent to him. Between receipt of the charges and the first meeting of the Faculty-Student Committee on Discipline (COD), Dean Onek met with plaintiff on four occasions to discuss the written and unwritten procedures of the COD. Plaintiff was unanimously found guilty of plagiarism and the COD voted to withhold her diploma for one year. The President of Princeton University upheld the COD decision on March 1, 1982, and plaintiff filed suit against the university on April 22, 1982.⁶

Although a number of issues were litigated at the trial, one key issue concerned whether intent to plagiarize was a necessary element of the offense. The 1978 edition of "Rights, Rules and Responsibilities" provided that the absence of intent was not a defense to a charge of plagiarism. The 1980 edition deleted the "absence of intent" phraseology and inserted the word "deliberate" in the definition of plagiarism.

Plagiarism. The *deliberate* use of any outside source without proper acknowledgement. "Outside source" means any work, published or unpublished, by any person other than the student.⁷

It was just such change on language which prompted the trial court to remand the matter to COD with a specific question as to whether "the

4. *Id.* at 267.

5. In her charge the professor "pointed to thirty-seven places where Napolitano used the exact language of the secondary source without attribution." 6 Lex Collegii 1 (1983).

6. Plaintiff's 14-count complaint included a wide range of legal theories: violations of N.J. Const. (1947), art. I, §1; contract; law of associations; fifth and fourteenth amendments; section 1983 of the Civil Rights Act; defamation; intentional infliction of emotional distress; invasion of privacy; malicious interference with contractual relationship. See 453 A.2d at 268.

7. 453 A.2d at 281 (emphasis supplied). The most recent "Rights, Rules and Responsibilities" (1984 edition) has eliminated the word "deliberate." *Supra* note 16 at 42. In addition the 1984 edition has added the following language relative to "False Data."

In determining whether academic fraud has occurred the Committee will take into account whether the student should reasonably have understood that his or her actions were in violation of University regulations. While failure to fulfill the general requirements for acknowledgement of sources in academic work may not necessarily involve academic fraud, any such failure will be considered an academic infraction and will normally result in disciplinary action.

use of the word 'deliberate' and the removal of the 'absence of intent' language dictated that the proscribed plagiarism must have been with the intent to pass off the submitted work as the student's own."⁸ Upon remand COD unanimously found plaintiff guilty of plagiarism and, with one abstention, imposed the same penalty of withholding her degree for one year.⁹ The finding of plaintiff guilty of intentionally plagiarizing is especially important since she did in fact cite the source in question on six occasions in footnotes.¹⁰ That fact plus her contention that Professor Malloy had recommended the source and thereby should not have been surprised at plaintiff's extensive use of it argued against intentional plagiarism according to plaintiff.¹¹ Instead the court seemed to rely on an objective standard finding that plaintiff had attempted to pass off the borrowings from her source as her own.

While plaintiff persists in her argument that she did not intend to plagiarize and that there is nothing in the proofs to show that she did so intend, the mosaic itself is the loudest argument against her.¹²

Among the items cited as evidence of plagiarism were the following:

- (1) A few statements from the source had been put in quotation marks but not the rest
- (2) The use, in the paper, of phrases such as "it is evident that," "it is important to note that," "one can assume that," etc. suggest that what follows is Ms. Napolitano's own thoughts and words, when in fact, in virtually all instances, what follows is words borrowed from the one source without attributions.
- (3) In several instances, there are quotes from the novel which is the subject of the paper. These quotes were used by the secondary source ... to illustrate various points. In making these same points (usually using the words of the secondary source), Ms. Napolitano used the same quotes but changed the page numbers of the quotes to correspond to the edition of the novel used in the course. This gives the appearance that Ms. Napolitano had found the quotes herself in the novel, which, in fact, she did not.
- (4) The verb tenses in the material borrowed from the source were all changed to the present tense for the sake of consistency in the paper.
- (5) Small words and phrases from the borrowed source were deleted in cases where these words may have seemed too technical or awkward.¹³

The above items are not only informative regarding the establishment of an objective standard but are illustrative of the kinds of student conduct which can be considered to be plagiarism.

8. 453 A.2d at 281.

9. *Id.* at 270.

10. Wait, *supra* note 15.

11. *Id.*

12. 453 A.2d at 276.

13. *Id.*

However, educational institutions need to be advised that the issue of whether intent will be part of academic dishonesty is not so much a separate judicial doctrine as a judicial interpretation of the institution's own handbook. In an unreported case, *Wait v. University of Vermont*,¹⁴ the university in its student handbook characterized academic dishonesty as "any acts which, if successful, would deceive, cheat, or defraud so as to promote, or enhance one's academic standing." The reference to "fraud" prompted the court to define fraud with its normal civil and criminal connotations.¹⁵ In addition, the university handbook noted, "Plagiarism occurs (when materials are presented) *in such a way as to lead the reader to believe that they originated with the writer.*"¹⁶ The handbook went on to state that a student could be found guilty of an academic offense by the university hearing panel only if "it is satisfied, *beyond a reasonable doubt*, that the student's actions meet the description of academic dishonesty."¹⁷ Finally, the handbook stated that the hearing panel could "consider extenuating circumstances, *including intent*, in its recommendations."¹⁸ The *Wait* case demonstrates the collage of confusing statements which can serve to contradict an institution's claim that intent should not be a factor in determining plagiarism. There is little wonder in *Wait* that the court observed, "it is clear from the facts before us that the [hearing panel] could not have found beyond a reasonable doubt that plaintiff intended to deceive his professor ... because there was no evidence of intent to deceive before them."¹⁹ *Wait* serves to illustrate the legal problems which can be created when language in disciplinary procedures appears to alter the stated definition of plagiarism.

The issue regarding intent to deceive as a necessary element for academic dishonesty highlights the importance of understanding the nature of the legal relationship between an educational institution and its students. The nature of the intent in academic dishonesty cases which is to be taken into consideration should be clearly stated in the student handbook as part of the institution's contract with the student.

Procedural Rights in Academic Dishonesty Cases

The question of whether students have procedural rights in academic dishonesty cases has become entwined with the issues of whether there

14. *Wait*, *supra* note 15.

15. *See Id.* at 7, 12-13 n.n.6, 7.

16. *Id.* at 7 (emphasis in original).

17. *Id.* (emphasis in original).

18. *Id.* (emphasis in original).

19. *Id.* at 8. However, despite the fact that the university had not followed its own guidelines the court affirmed plaintiff's suspension because plaintiff had been afforded appropriate due process and not been able to meet "his burden of demonstrating that the decision of the [hearing panel] was clearly arbitrary or capricious." *Id.* at 9.

is a protectable property or liberty right at stake and plagiarism and cheating penalties are considered to be disciplinary.

Property interests "are created and their dimensions defined by existing rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."²⁰ A liberty interest relates to a student's "good name, reputation, honor or integrity"²¹ and precludes the imposition of a "stigma" without due process of law.²² In *Board of Curators of University of Missouri v. Horowitz*²³ the Supreme Court was clear that "the mere fact of dismissal, absent some publications of the reasons for the action" would not amount to a stigma infringing one's liberty.²⁴

The specific due process procedures to which a student is entitled in academic dishonesty must be set against a backdrop of judicial concern about adversarial setting for resolution of academic problems. In *Mary M. v. Clark*,²⁵ a court observed in reviewing a student dismissal from a state supported university for cheating on an examination:

We concur with the policy considerations enumerated in cases dealing with student discipline which recognize that the student's welfare is best served by a nonadversarial setting which emphasizes the educational functions of disciplinary proceedings.²⁶

In *Jansen v. Emory University*²⁷ another court commented regarding dismissal of a student from a private university for poor grade performance:

Plaintiff is correct in observing that the traditional rule of nonintervention in academic matters does not apply to review of disciplinary actions by educational institutions ... as long as the decision to discuss Jansen was essentially academic and was neither alleged nor shown to be a mere pretense to punish him for disciplinary infractions, it is not subject to judicial review as a breach of the educational contract.²⁸

20. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *Accord* *Ryan v. Sures City Bd. of Educ.*, 540 F.2d 222 (6th Cir. 1976); *Skidmore v. Shamrock Indep. School Dist.*, 464 F.2d 665 (5th Cir. 1972); *Miller v. School Dist.*, 500 F.2d 711 (7th Cir. 1974). In *Roth* a university faculty member hired for a one-year teaching position had no statutory or contractual expectation of employment beyond that year and thus no constitutionally protected property right.

21. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

22. *Roth*, 408 U.S. at 573; *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

23. 435 U.S. 78 (1978).

24. *Id.* at 97 with reference to *Bishop v. Wood*, 426 U.S. at 348. *See also* *Paul v. Davis*, 424 U.S. 693, 701 (1976) ("reputation alone, apart from some more tangible interest such as employment, is neither 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the due process clause.").

25. 473 N.Y.S.2d 843 (N.Y. App. Div. 1984).

26. *Id.* at 845.

27. 440 F. Supp. 1090 (N.D. Ga. 1977).

28. *Id.* at 1063.

Judicial policies of abstention in and nonadversarial settings for academic matters could not be interpreted to mean that certain procedures are not due students prior to discipline for academic offenses. There are six different procedural rights that courts have identified that may be applicable to cases of academic dishonesty such as plagiarism: notice; right to counsel; cross-examination; right to a hearing; reasons for a decision; and an appeal process.

Notice

Since academic dishonesty cases generally receive a lesser degree of scrutiny from disciplinary misconduct cases, requirements for notice would seem to be less formal. However, in *Jaska v. Regents of University of Michigan*,²⁹ a federal district court noted in a dismissal case for cheating that, the notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the board of education.³⁰ It should also be added that *Jaska* interpreted *Horowitz* to indicate that "cheating should be treated as a disciplinary matter,"³¹ as opposed to academic. Generally, the better course of action would be to furnish a student with a written statement of allegations regarding plagiarism. In most cases, notation of plagiarism on the student's work should constitute adequate notice. But, as in *Napolitano*,³² the written notations will invariably be followed up with conferences and memoranda. While it might be possible for a student to be disciplined without knowledge of what he had plagiarized, it seems highly improbable that such would be the case.³³ There is some authority that charges of academic dishonesty do not have to be in writing even if school practice would have required it because "such a violation of internal rules does not establish a cognizable constitutional violation."³⁴ Although there is no clear indication as to what constitutes a timely notice, it would seem that the only requirement would be a reasonable amount of time to allow a student to prepare his defense.³⁵

Right to Counsel

A far more persistent problem in academic dishonesty cases involves the student's right to counsel and the role of counsel during the aca-

29. 397 F. Supp. 1245 (E.D. Mich. 1984).

30. *Id.* at 1249.

31. *Id.* at 1249 n.2. The court's rationale was expressed as following:

In this case (*Horowitz*), the proceedings against plaintiff primarily involved resolution of factual disputes, and there was little need for subjective judgment or evaluation. Further, dismissal for cheating requires greater procedural protection than academic dismissals since the former are more stigmatizing than the latter, and may have a greater impact on a student's future.

32. See *supra* notes 1-6 and accompanying text.

33. For an almost incredible scenario, see *Crosby v. Baker*, 584 F. Supp. 1531 (E.D. Mich. 1984) where an investigation regarding alleged fabrication of data in a master's program was carried out in secret and the student's attorney had difficulty in acquiring access to information gathered by faculty members.

34. *Hall v. Medical College of Ohio*, 742 F.2d at 309, citing *Horowitz* at 97 n.8.

35. See *Hall*, 742 F.2d at 309 and *Crosby*, 584 F. Supp. at 1539.

ademic hearing. Absent a student handbook provisions permitting legal counsel at a hearing there is no clear indication that constitutional due process requires the presence of an attorney because "a school is an academic institution, not a courtroom or administrative hearing room."³⁶ The *Napolitano* court³⁷ refused to expand the university's practice to include an attorney because "the academic community's control over its own affairs would be unjustifiably limited."³⁸ In *Napolitano*, Princeton University had a provision permitting a student to select an advisor from within the academic community to appear with her at the academic hearing.³⁹ Absent a written assurance of representation by an attorney or nonlegal advisor, there does not appear to be a constitutional requirement of representation on behalf of the student.⁴⁰

Notwithstanding the apparent absence of a due process requirement of representation, there are several factors various courts have considered in determining whether the student should have some form of representation. In *Napolitano*, the court referred to the absence of counsel representing the university at the hearing as part of its rationale for ruling against the student's claim to legal counsel.⁴¹ Courts have also been influenced by the effect which an attorney might have had on the student's behalf at the academic hearing. In *Jaska v. Regents of University of Michigan*,⁴² the university refused to allow the plaintiff-student to bring a representative to the hearing. In ruling against the student the federal district court identified three items to support its conclusion:

- (1) The Manual of Procedures for the Academic Judiciary is written in plain English and is comprehensible to the average college student.⁴³
- (2) The University did not proceed against plaintiff through an attorney or other representative.⁴⁴

36. *Horowitz*, 435 U.S. at 89.

37. *Napolitano*, 453 A.2d at 282.

38. *Id.*

39. *Id.* See also *Clayton v. Trustees of Princeton University*, 519 F. Supp. 802 (D.N.J. 1981).

40. However, cases dealing with disciplinary proceedings for misconduct appear to require representation of counsel at discipline hearings. Compare *Givens v. Poe*, 346 F. Supp. 212 (W.D.N.C. 1972) (Due process clause requires representation by counsel at suspension hearings) and *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 390 U.S. 965 (1970) (Due process clause requires representation by counsel at a suspension hearing.) with *Madera v. Board of Education*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968) (No right to counsel at a conference relating to the suspension of a student) and *Everett v. Marcuse*, 426 F. Supp. 397 (E.D. Pa. 1977) (Due process does not require the presence of an attorney at a formal hearing on disciplinary transfers.)

41. *Napolitano*, 453 A.2d at 282.

42. 597 F. Supp. 1245 (E.D. Mich. 1984).

43. *Id.* at 1252.

44. *Id.*

- (3) The hearing was not subject to complex rules of evidence or procedure.⁴⁵

The presence of the second or third items above would probably require some form of representation for the student.⁴⁶

Even where a student has representation at his hearing, the student can still prevail if the role of his representative is unreasonably restricted. In *Clayton v. Trustees of Princeton University*,⁴⁷ the student's representative (a student and not an attorney) was informed by a member of the Honor Committee that the role of the representative was not "that of an attorney for the defense" but rather "to make certain that a 'balanced' picture was presented."⁴⁸ In ruling for the student, the *Clayton* court noted that such undercutting of loyalty to the plaintiff and frowning on partisanship "materially affected the accused's rights under the Honor Constitution."⁴⁹ In *Crook v. Baker*,⁵⁰ plaintiff was permitted to have an attorney at his hearing regarding rescission of his degree, but the severe restrictions placed on his attorney in cross-examination and in objecting to committee procedures "greatly increased the risk of erroneous deprivation because the facts underlying the Department's charges were highly disputed and the credibility of witnesses was at issue."⁵¹ The court's conclusion in *Crook* was aided by misrepresentation of the university's general counsel regarding his function, misstatements about plaintiff's burden of proof, and misdirections to plaintiff's attorney about his function in representing plaintiff.⁵²

In summary, a student's right to counsel, or at least a nonlegal advisor of his choice, will be affected by two factors: the educational institution's use of legal counsel and restrictions placed on the student's ability to challenge the proceedings against him and evidence received at the hearing. This latter concern raises the issue of cross-examination.

Cross-Examination

Of all constitutional privileges none is more valuable to the accused than the right to question those who furnish evidence against him. Even where an attorney or other advisor is not present a court will take note of the effectiveness of the student's ability to cross-examine and expose flaws in the school's case.⁵³ In *Napolitano*, plaintiff alleged as one of her errors in her academic hearing involving plagiarism that she was informed she could present her own case but was not informed "she had a

45. *Id.*

46. *Id.* The *Jaska* court suggests this conclusion.

47. 519 F. Supp. 802 (D.N.J. 1981).

48. *Id.* at 807.

49. *Id.*

50. 584 F. Supp. 1531 (E.D. Mich. 1984).

51. *Id.* at 1557.

52. *Id.* at 1551-52. Attorneys who represent educational institutions would do well to read the judge's written reprimand of the General Counsel's handling of the academic hearing process.

53. *Clayton*, 519 F. Supp. at 807.

right of cross-examination, as provided in the student handbook."⁵⁴ The trial court remanded her case for a new hearing before the committee on discipline with instructions that "she be afforded the right to cross-examine any witnesses presented against her."⁵⁵

While the right to counsel may not be viewed as a necessary requirement in all academic dishonesty cases, the right of cross-examination clearly is. And any impairment of that right will be viewed with suspicion by courts. In *Clayton*,⁵⁶ the discouragement of plaintiff's nonlegal student advisor from serving as an advocate in cross-examination was sufficient to withstand the university's request for summary judgment. In *Crook*,⁵⁷ the persistent interruption and cross-examination by committee members of the plaintiff-student and the equally persistent refusal to allow plaintiff's attorney to cross-examine adverse witnesses were fatal to the university's cause.⁵⁸ In addition, the university "introduced into evidence over 100 unsworn letters and notes addressed 'to whom it may concern'"⁵⁹ which, of course, denied plaintiff and his attorney an opportunity to cross-examine their authors.

As important a right as cross-examination is, there are some legitimate restrictions which are justifiable. For example, in *Crook* the hearing committee chairman imposed a requirement that plaintiff's attorney could pass questions to the chair and the chair might ask them.⁶⁰ Although the *Crook* court did not make reference to this procedure, some modification of what was done in *Crook* would seem to be permissible. Requiring all cross-examination to be addressed to the chair rather than the witness would seem to be acceptable as consistent with the judicial concern about a nonadversarial setting for academic dishonesty cases.⁶¹ However, to permit the chair to elect which written questions should be asked, as was done in *Crook*, would probably be an unreasonable restriction on cross-examination. In *Jaska*, the court refused to uphold plaintiff's claim that he should be able to cross-examine the anonymous student who reported plaintiff's cheating.⁶² The *Jaska* court took a somewhat limited approach by restricting cross-examination only to those officials or teachers with primary knowledge of facts relevant to the proceeding.⁶³ The *Jaska* limitation regarding student informants should not be a problem in plagiarism situations because the

54. *Napolitano*, 451 A.2d at 281.

55. *Id.* at 281-82. The result of the rehearing remained unchanged: plaintiff's diploma was to be withheld for one year.

56. See *supra* note 47.

57. See *supra* note 50.

58. *Id.* at 1545, 1547, 1560.

59. *Id.* at 1543.

60. *Id.* at 1541.

61. See *Mary M. v. Clark*, 473 N.Y.S.2d 843, 845 (N.Y. App. Div. 1984); *Jensen v. Emory University*, 440 F. Supp. 1060, 1062-63 (N.D. Ga. 1977).

62. *Jaska*, 507 F. Supp. at 1253.

63. *Id.*, citing *Dillon v. Pulaski County Special School Dist.*, 408 F. Supp. 54, 58 (E.D. Ark. 1978). The policy underlying this position is that anonymity of student accusers is necessary to protect them from reprisals from other students.

instructor presumably would make an independent investigation regarding the accuracy of the allegation of plagiarism before making any formal charge.

Right to a Hearing

The Supreme Court in *Horowitz* determined that "a hearing is not required by the due process clause of the fourteenth amendment."⁶⁴ However, that case also involved an exhaustive evaluative process that extended over several semesters and involved evaluation by a number of different faculty members. Plagiarism and cheating can be distinguished from the *Horowitz* set of facts where the issues focused on faculty members' subjective judgment concerning the student's clinical medicine performance. A charge of plagiarism or cheating is not a long-term subjective matter and, once proved, presumably could result in punishment for the student.

Although a student may not necessarily be entitled to a hearing before a formal tribunal in academic dishonesty situations, there are clearly two parameters which will affect that student's entitlement: provisions in the student handbook regarding a hearing and, at the very least, a minimal opportunity for the student to present evidence on his behalf and contest evidence against him. Clearly, written standards established by an institution regarding the hearing rights of a student in academic dishonesty cases such as plagiarism or cheating are controlling and deviations will be permitted only where the student would not otherwise be prejudiced.

The frequently referred to case of *Crook v. Baker*⁶⁵ is a worthwhile study of the problems an institution can create for itself when it deviates from established procedures. The university had a grievance appeal process for graduate students utilizing a three-member panel composed of faculty and students, but university officials not only eliminated all lower, mediatory steps of the process but they removed all student participation from the panel. The hearing officers became handpicked professors.⁶⁶ Despite assurance by the university's general counsel⁶⁷ that witness lists would be exchanged "the department produced unlisted witnesses at the hearing."⁶⁸ General counsel informed plaintiff's attorney prior to the hearing that the department's burden of proof in the rescission of degree hearing was a "clear and convincing standard of proof," but then informed the hearing committee in his opening statement that the burden of proof was a "preponderance of the evidence."⁶⁹

64. *Horowitz*, 435 U.S. at 88 n.3.

65. 584 F. Supp. 1531 (E.D. Mich. 1984).

66. *Id.* at 1539.

67. The general counsel initially limited his role as advisor to the department bringing charges against plaintiff to rescind his degree, but later compromised his position by advising the highest board of appeal in the graduate school. *Id.* at 1549-50, 1552.

68. *Id.* at 1543.

69. *Id.* at 1543-44.

In addition, the error was further exacerbated because the hearing committee chairman "placed the burden upon plaintiff to explain away the charges and the department was not required to meet any burden."⁷⁰ Plaintiff-student's attempt to present his explanation was punctuated by frequent questions and contradictions from members of the department at the hearing; indeed the court observed that the transcript revealed the hearing to be "an all-day free for all."⁷¹ During the hearing committee's post-hearing deliberations the department continued its investigation of plaintiff and furnished the committee with what appeared to be a considerable amount of *ex parte* evidence. Plaintiff's attorney objected, at no avail,⁷² to this post hearing evidentiary submission by the department as "violative of basic concepts of fairness."⁷³ There is little wonder that in overruling the university's decision to rescind the master's degree of plaintiff the federal district court observed that:

The arbitrary rescission of a degree, after a university has supposedly determined with all due deliberation that one has met all of the requirements for that degree, damages the university's academic integrity as much as, if not more than, the student's fraud in obtaining the degree.⁷⁴

Presumably, the subsequent discovery by a faculty member of plagiarized assignments, or even a thesis or dissertation, could result in an institution's desire to rescind a degree. The *Crook* decision highlights two legal problems with fulfilling such a desire. The first is the authority of a school to rescind a degree where there is no express authority in the institution's legal documents.⁷⁵ The second concerns the institution's adherence to its own hearing process and rules of procedure.

Other cases have indicated legal problems which can arise in hearings involving academic dishonesty. In *Jaska v. Regents of the University of Michigan* the federal district court indicated that some "procedural irregularities" can be permitted without violating constitutional standards.⁷⁶ The *Jaska* court found that a hearing held six weeks and five days after the charge of cheating was made, instead of the mandated six weeks, "did not constitute a denial of due process."⁷⁷ In addition, a

70. *Id.* at 1544.

71. *Id.* at 1545.

72. The diligent and persistent defense of his client throughout this case earned for plaintiff's attorney the plaudits of the federal court. "The tenacity and ardor of his advocacy of the most fundamental principles upon which the republic rests throughout this unfortunate saga vindicates not only the University (of Michigan) which produced him, but that of the legal profession as well." *Id.* at 1552.

73. *Id.* at 1548.

74. *Id.* at 1557. (Emphases added).

75. Plaintiff's attorney raised this objection and the trial court discussed the issue without resolving it. The only authority for rescission of a degree is an old English case, *Rex v. Cambridge University*, 92 Eng. Rep. 818 (1723). *Id.* at 1544, 1556.

76. *Jaska*, 597 F. Supp. at 251.

77. *Id.* at 1251 n.6.

requirement that members of the hearing panel be appointed by the student government could be altered for a hearing held during the summer months when most students are gone from the campus and the appointment could be accomplished by the academic judiciary.⁷⁸ Where such relatively minor procedural irregularities occur a court will tend to look at the results of the hearing and in *Jaska* the court noted that "there is nothing in the record to indicate that the panel's decision was anything less than impartial or fair."⁷⁹ However, where university rules call for a hearing panel and the student is provided only informal meetings with two deans and the president's assistant, such a substitution was not considered "sufficient compliance with the guideline."⁸⁰ In *Ryan v. Hofstra University*,⁸¹ a disciplinary as opposed to academic dishonesty case, a student was entitled to a hearing before the student judiciary board unless a student's record indicated "significant emotional or psychological disturbance."⁸² Where a student was denied appearance before the university's judiciary board the dean was held to have "acted arbitrarily and in abuse of discretion"⁸³ in denying plaintiff's appearance.

Reasons for Discharge

The question as to whether a hearing panel must furnish written reasons supporting a "guilty" finding has been addressed occasionally by the courts. In *Jaska v. Regents of the University of Michigan*,⁸⁴ a federal district court found adequate a statement to plaintiff-student from the hearing board that plaintiff had been found "guilty of cheating in Statistics 402 as a result of the case presented by Professor Rothman."⁸⁵ Although there is some indication that written reasons may be required in misconduct discipline cases,⁸⁶ such would not seem to be the situation in academic dishonesty cases, such as plagiarism or cheating, because as the court noted in *Jaska*: "Here, plaintiff had written notice of the specific charges against him and, due to the nature of the accusation, the reasons for the panel's decision were obvious."⁸⁷ By the nature of the offense, a charge of plagiarism would specify portions of student material alleged to have been plagiarized and thus a

78. *Id.*

79. *Id.*

80. *Tedeschi v. Wagner College*, 404 N.E.2d 1302, 1304 (N.Y. 1980). The college's handbook provided for a board hearing if suspension or expulsion was "for any cause other than failure in his academic work." The court determined that there were factors in addition to academic at issue and therefore the student should have had a hearing. *Id.* at 1304, 1306.

81. 324 N.Y.S.2d 964 (N.Y. Sup. Ct. 1971).

82. *Id.* at 975.

83. *Id.*

84. 597 F. Supp. 1245 (E.D. Mich. 1984).

85. *Id.* at 1253.

86. *Id.*

87. *Id.* at 1254.

simple "guilty" finding would fit within the *Jaska* rationale. However, if intent to plagiarize is an issue it would seem to be advisable for a hearing panel to furnish a statement regarding the evidence supporting its finding of intent.⁸⁸ It would seem necessary for a hearing committee to comment about the credibility of witnesses, although one federal district court felt compelled to discuss in detail the credibility of witnesses on both sides.⁸⁹

Appeal Process

Educational institutions invariably appear to have some form of internal appeal process beyond the hearing panel.⁹⁰ An appeal process serves important functions ranging from detection of procedural errors by the hearing panel to simple requests for clemency based on the student's particular situation. Thus it is important that the appeal itself be conducted with the same conformity to written guidelines and sense of fairness as the hearing panel.

Some of the kinds of problems identified with the appeal process are addressed below. One problem concerns the weight which the persons hearing the appeal are to give to the decision of the hearing panel. In *Lyons v. Salve Regina College*,⁹¹ the school's guidelines provided that following a hearing of the grade appeals committee "the recommendation of the committee is made to the Dean of Students/Associate Dean of the college."⁹² Two of the three committee members voted to award plaintiff-student an *incomplete* in the course while the third would have awarded plaintiff an *F* and required plaintiff to apply for reinstatement to the nursing program. On appeal, the dean of the college overruled the majority and awarded plaintiff an *F*. The trial court found for the plaintiff and ordered reinstatement of plaintiff into the nursing program.⁹³ In overturning the trial court, the federal appeals court concluded, "there is nothing in the instant record to indicate that a student at Salve Regina College had any rational basis for believing that the word 'recommendation' meant anything more than its normal everyday meaning."⁹⁴ Thus, the use of the term "recommendation" was viewed as nothing more than "an expression of the Committee's opinion as to the preferred course of conduct to be followed by the Dean."⁹⁵ In other words, the committee's decision was advisory rather than mandatory.

88. In *Napolitano* it appears that the court interpreted the hearing committee's guilty verdict as a nonacceptance of plaintiff's explanations regarding intent, especially in light of the committee's written summary of findings of intent based on the student's mosaic of plagiarism violations. 453 A.2d at 270, 276.

89. *Crook v. Baker*, 584 F. Supp. at 1551-52.

90. E.g., Princeton University, Rights, Rules, Responsibilities (1984), at 53; Liberty University, The Liberty Way (1984-86), at 16-17.

91. 565 F.2d 200 (1st Cir. 1977).

92. *Id.* at 201.

93. *Lyons v. Salve Regina College*, 422 F. Supp. 1354 (D.R.I. 1976).

94. 565 F.2d at 202-203.

95. *Id.* at 203.

However, where the weight of the hearing panel's decision is unclear a different result can occur. In *Jones v. Board of Governors of the University of North Carolina*,⁹⁶ a student was charged with cheating on a final examination. A university student court had initially found plaintiff-student guilty of "academic dishonesty" but after a second hearing requested by the chancellor she was found not guilty. Notwithstanding the hearing panel's decision the university counsel objected to the chancellor who referred the matter to the vice-chancellor for academic affairs. After reviewing the transcript, the vice-chancellor awarded plaintiff a failing grade and placed her on disciplinary probation for one semester; but as a result of the failing grade she was dropped from the College of Nursing. The federal district court granted plaintiff's order for reinstatement⁹⁷ and the appeals court affirmed. In overruling the vice-chancellor's decision, the appeals court found troublesome "the reviewing officer's rejection of the tribunal's determination, whether that determination was rendered as finding or as advice."⁹⁸ In other words, the *Jones* court appears to be stating that in the absence of evidence that a hearing panel's decision is advisory, an adverse appeal decision must have some "expression of reasons"⁹⁹ for the adverse decision.

Where a student has been found "not guilty" of a charge of academic dishonesty, such as plagiarism, it is expected that a school's internal appeal process will correct whatever penalties may have already been assessed against the student. In *Lightsey v. King*,¹⁰⁰ a student at the United States Merchant Marine Academy was found "not guilty" by its honor board of cheating on an examination. However, the faculty member who had brought the charge of cheating refused to credit plaintiff with the test score he received on the test, on which he allegedly cheated, and to change the *F* to a higher grade. The federal district court refused to consider this case as one involving academic discretion in grading and refused to countenance the academy's option of allowing the student to retake the exam.¹⁰¹ In deciding for the student and ordering him to be credited with his test score the court relied on the academy's own regulations. "The Merchant Marine Academy chose to adopt regulations creating an Honor Board, and it chose to vest that Board with authority over charges of lying, cheating or stealing made against Cadets."¹⁰²

As a final note, it may be necessary to change the office or person who hears an appeal. Such changes would be permissible as long as they are supported by a reason that does not create any unfairness for the

96. 704 F.2d 713 (4th Cir. 1983).

97. 557 F. Supp. 263 (W.D.N.C. 1983).

98. 704 F.2d at 716.

99. *Id.*

100. 567 F. Supp. 645 (E.D.N.Y. 1983).

101. *Id.* at 648, 649.

102. *Id.* at 650.

student. For example, in *Crook v. Baker*¹⁰³ the change of the office to which an appeal was taken was apparently acceptable because the person who occupied the office at the time of the appeal had earlier held a lower office and had been involved in bringing charges of fabricated evidence against plaintiff.¹⁰⁴

Conclusion

Based upon available case law the following standards apply in plagiarism or cheating cases.

- (1) A student should have some written indication of his cheating or plagiarism and, in the case of plagiarism, the source from which the alleged plagiarized material was taken.
- (2) Although there is no right to counsel in academic dishonesty cases, it is well to remember that courts will apply a fairness test, evaluating such items as the institution's use of an attorney and the complexity of the hearing panel's rules.
- (3) There would seem to be no valid reason for not permitting a student accused of academic dishonesty the opportunity to cross-examine those who furnish testimony against him at the hearing; however, there would seem to be no problem in requiring that all questions be directed to the chairman for the sake of decorum.
- (4) Although a student in an academic dishonesty situation, absent a school regulation to the contrary, may not be entitled to a hearing panel, he is entitled to appear before a school officer, hear evidence against him, and offer evidence in his own behalf.
- (5) Unless school rules require that reasons be given upon a finding that a student has committed the offense of plagiarism or cheating, the finding of guilty should in itself furnish sufficient reason.
- (6) Some form of appeal process beyond the individual or committee that renders a decision regarding violation of plagiarism or cheating should be provided; however, any limitations upon the person or group hearing the appeal should be expressly made clear.

103. 584 F. Supp. 1531.

104. *Id.* at 1550.

Sexual Harassment in Employment and Educational Practices

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Sexual harassment is not a new phenomenon. It has existed in the workplace since men and women have worked together. What is new, however, is society's attitude toward sexual harassment. Once considered a joke or of little importance, sexual harassment has been identified as being a widespread and significant workplace problem that needs to be eliminated. For example, in a 1976 survey reported in *Redbook* magazine, approximately 90% of the 9,000 respondents reported that they had experienced one or more forms of sexual harassment.¹ The majority of respondents indicated that they found the behavior embarrassing, demeaning, or intimidating.²

Since 1976, numerous surveys and research studies have been conducted on the subject of sexual harassment.³ These findings indicate that sexual harassment is a serious social problem which affects primarily women but also men of all ages, racial, socio-economic, and occupational groups, although younger women are the most vulnerable. Sexual harassment is not the fault of the victim. However, most victims often do not report sexual harassment due to feelings of isolation, guilt, and the fear of losing their jobs or other retaliation.

This chapter will examine the statutory and case law concerning sexual harassment in employment and education practices. It will also provide recommendations and suggestions for developing policies and procedures for the prevention of sexual harassment and strategies for effectively resolving complaints.

1. Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, 149 *Redbook* 217-224 (Nov. 1976).

2. *Id.*

3. Silverman, *Sexual Harassment: Working Women's Dilemma*, 3 *Quest: A Feminist Quarterly* (Winter 1976); K. MacKinnon, *Sexual Harassment: The Experience*, *The Criminal Justice System and Women* (Price & Sukoloff eds. 1982); J. Abramson, *Old Boys*, *New Women: The Politics of Sex Discrimination* (1979); L. Farley, *Sexual Shakedown: Sexual Harassment of Women on the Job* (1978); K. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979); E. Collins & T. Blodgett, *Sexual Harassment - Some See It Some Won't*, *Harv. Bus. Rev.* (March-April 1981).

Title VII

Title VII of the Civil Rights Act of 1964 is the principal federal legislative protection for individuals who believe they have been victims of discrimination in employment. Title VII prohibits discrimination on the basis of race, color, religion, national origin or sex. Specifically it provides in part:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; and (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.⁴

In addition, Congress established the Equal Employment Opportunity Commission, which is the administrative agency that provides for the monitoring and enforcement of title VII.

On April 11, 1980, the Equal Employment Opportunity Commission issued interim amendments to its guidelines on discrimination on the basis of sex "to clarify its position on... sexual harassment and to invite the public to comment on the issue."⁵ The commission's final guidelines were issued with minor modification on September 23, 1980, and provide:

Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.⁶

The guidelines do not provide specific definitions between offensive and inoffensive behaviors or conditions in the workplace but they do recognize that such conduct may constitute sex discrimination. Clearly, acquiescence to sexual advances, requests for sexual favors or other conduct of a sexual nature constitutes sexual harassment when it is a

4. 42 U.S.C. § 2000e-2.

5. 45 Fed. Reg. § 25,025 (1980).

6. 29 C.F.R. § 1604.11(a). It should be noted that EEOC in defining the terms "unwelcome sexual advances" and "unreasonable interference with work performance" will look to the "record as a whole and at the totality of the circumstances" to determine whether alleged conduct amounts to sexual harassment.

term or condition of employment, and would be contrary to sections (1) and (2) of the guidelines. In addition, promises or threats by a supervisor to grant a promotion, a raise, or other benefits in exchange for submission to sexual advances; or to fire, demote, or transfer in retaliation for a refusal would be similarly illegal. Under section (3), a sexual advance not directly linked to compensation, training, promotion, termination or other term of employment may be considered unlawful if it interferes with the person's work performance or creates an environment in which a person's work would likely be adversely affected. Therefore, sexual advances or other such conduct could become unlawful when they are so frequent or abusive that they become part of the working conditions of the employer.

Under the guidelines an employer is held responsible for the acts of its *agents and supervisory employees* "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."⁷ In contrast, an employer is held responsible for *conduct between employees* "in the workplace where the employer (or its agents or supervisory employees) *knows or should have known* of the conduct, *unless* it can show that it took immediate and appropriate corrective action."⁸ Moreover, an employer may also be responsible for sexual harassment of its workers by non-employees in the workplace "where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action."⁹

Individuals who believe that they have suffered discrimination in violation of title VII must exhaust their administrative remedy by filing with the Equal Employment Opportunity Commission before they may proceed to the federal courts.¹⁰ It should be noted that most states have promulgated statutes prohibiting discrimination in employment. Some state and local statutes have provisions specifically prohibiting sexual harassment in employment or educational practices.¹¹ Therefore, individuals may consider filing complaints of discrimination with state or local agencies.

7. 29 C.F.R. § 1604.11(c).

8. 29 C.F.R. § 1604.11(b).

9. 29 C.F.R. § 1604.11(e).

10. Under title VII individuals have 180 days in states where there are no state agencies or 300 days in states where Fair Employment Practice agencies exist to file charges of discrimination. EEOC or FEP agencies conduct investigations, administrative hearings, issue determinations and negotiate conciliation agreements. Parties may file suit in federal district court 180 days after a charge has been filed or 90 days after EEOC issues their findings. In some instances EEOC may file suit on behalf of a complainant when conciliation fails. See 29 C.F.R. § 1601.1-29.

11. See, e.g., Wash. Rev. Code § 49.60 (1962); Mich. Comp. Laws Ann. § 37.2103 (1976); Wis. Stat. Ann. § 111.32(13) (1982); Ill. Exec. Order 80-1 (1980); Equal Opportunities Commission, Madison, Wis. Ordinance § 328(7)(j) 1980; D.C. Mayor's Order No. 70-89 (1978). See also Board of Educ. of Alamo-Gordo Pub. Schools Dist. No. 1 v. Jennings, 631 P.2d 1037 (N.M. Ct. App. 1982). Sexual harassment constitutes unsatisfactory work performance under state education law.

The Courts and Sexual Harassment

The first case to address the issue of sexual harassment as a violation of title VII was *Barnes v. Train* in 1974.¹² In this case, a woman alleged she was reassigned and her position abolished because she refused to have sexual relations with her male supervisor.¹³ The district court granted a motion for summary judgment to dismiss, ruling that the plaintiff failed to state a claim actionable under title VII. The court explained:

The substance of plaintiff's complaint is that she was discriminated against not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.¹⁴

In *Corne v. Bausch and Lomb, Inc.*,¹⁵ the same rationale was used to discuss a case brought by women alleging that they were repeatedly subjected to verbal and physical sexual advances by their supervisor. If they cooperated, favorable treatment resulted. Subsequently, the women were compelled to resign to escape these conditions.¹⁶

In dismissing the case for failure to state a claim, the court explained that the supervisor's actions did not reflect company policy and were "nothing more than a personal proclivity, peculiarity or mannerism."¹⁷ The court also stated that "there is nothing in (title VII) which could reasonably be construed to have it apply to 'verbal and physical advances' by another employee, even though he be in a supervisory capacity where such conduct had no relationship to the nature of em-

12. 13 Fair Empl. Prac. (BNA) Cas. 123 (D.D.C. 1974), *rev'd sub nom.* *Barnes v. Cottle*, 561 F.2d 983 (D.C. Cir. 1977). It should be noted that almost all cases involve female plaintiffs. However, the principles apply to either sex. See, e.g., *Huebschen v. Department of Health and Social Servs.*, 547 F. Supp. 1168 (W.D. Wis. 1982). A male employee was demoted for ending a sexual relationship with a female supervisor, and in *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981), a male employee was sexually harassed by a male supervisor in violation of title VII. For a discussion on sexual harassment in the workplace, see Polansky, *Sexual Harassment at the Workplace*, 8 Human Rights 14 (1980); Seymour, *Sexual Harassment: Finding a Course of Action Under Title VII*, 30 Lab. L.J. 139 (1979); Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 Wash. L. Rev. 123 (1977); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 Mich. L. Rev. 1007 (1978); McCarthy, *Discrimination in Public Employment: The Evolving Law* (NOLPE Monograph 1983).

13. 13 Fair Empl. Prac. (BNA) Cas. at 124.

14. *Id.*

15. 380 F. Supp. 161 (D. Ariz. 1974), *vacated and remanded without opinion*, 562 F.2d 55 (9th Cir. 1977).

16. 380 F. Supp. at 162.

17. *Id.* at 163.

ployment."¹⁸ The court also expressed its concern that there "would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another" if sexual harassment were found to be in violation of title VII.¹⁹

The *Barnes* and *Corne* decisions illustrate the court's early reluctance to find sexual harassment a violation of title VII. On appeal, however, a different position was taken by the courts. In *Barnes*,²⁰ the District of Columbia Circuit Court of Appeals reversed, declaring that the "discrimination as portrayed was plainly based on gender."²¹ The facts showed that "retention of her job was conditional upon submission to sexual relations — an exaction which the supervisor would not have sought from any male."²² Thus, the charges were sufficient to state a cause of action under title VII. The court explained, however, that the sexual advance alone did not give rise to a title VII violation:

The vitiating ex factor ... stemmed not from the fact that what [plaintiff's] supervisor demanded was sexual activity — which of itself is immaterial — but from the fact that he imposed upon her tenure in her then position a condition which ostensibly he would not have fostered upon a male employee.²³

The Ninth Circuit Court of Appeals vacated the *Corne* decision and remanded without opinion.²⁴

In *Miller v. Bank of America*,²⁵ the Ninth Circuit again reversed the lower courts finding that a woman, discharged for refusing the sexual advance of her supervisor, did not state a claim actionable under title VII. The lower court relied on the existence of a company policy prohibiting sexual advances and the fact that the plaintiff did not avail herself of an internal grievance procedure.²⁶

The court of appeals was faced with the issue "that if the bank, rather than just Miller's supervisor can be held responsible, the discharge can properly be called on because of Miller's race and sex ... and so a

18. *Id.*

19. *Id.*

20. *Barnes v. Costle*, 362 F.2d 983 (D.C. Cir. 1977).

21. *Id.* at 990.

22. *Id.*

23. *Id.* at 989 n. 25.

24. *Corne v. Bausch and Lomb, Inc.*, 362 F.2d 35 (9th Cir. 1977). See also *Williams v. Saxby*, 413 F. Supp. 634 (D.D.C. 1976), *rev'd and remanded sub nom.* on other grounds, *Williams v. Bell*, 367 F.2d 1249 (D.C. Cir. 1976). On remand the district court ruled for the plaintiff, finding "that submission to the sexual advances of the supervisor was a term and condition of employment in violation of title VII." 25 *Emp. Prac. Dec.* (CCH) 30 (D.D.C. 1986).

25. 418 F. Supp. 231 (S.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

26. 600 F.2d at 235-236.

violation of both title VII and 42 U.S.C. § 1981."²⁷ In finding for *Miller* the court explained:

Title VII and Section 1981 define wrongs that are a type of tort, for which an employer may be liable. There is nothing in either act which hints at a congressional intention that the employer is not liable if one of its employees, acting in the course of his employment, commits the tort. Such a rule would create an enormous loophole in the statutes.²⁸

The court also rejected the argument that title VII required that a person exhaust an employer's internal remedies before filing a charge.²⁹

The case of *Tomkins v. Public Service Electric & Gas Co.*³⁰ involved allegations that a woman's supervisor made sexual advances and detained her against her will through economic threats and physical force.³¹ She complained to the company and sought and received a transfer. After assuming her new position, she was allegedly subjected to disciplinary threats and eventually terminated in retaliation for her original complaint.³²

The court of appeals found that the demand for sexual favors amounted to a condition of employment imposed upon her because of her sex. The court noted that for a violation of title VII to occur, an employee must have imposed a term or condition of employment in a discriminatory manner:

Title VII is violated when a supervisor, with actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status—evaluation, continued employment, promotion, or other aspects of career development — on a favorable response to these advances or demands, and the employer does not take prompt and appropriate action after acquiring such knowledge.³³

The court distinguished between complaints of sexual advances of a personal nature and those resulting in direct employment consequences resulting from the advances, the latter being a violation of title VII. The supervisor's sexual advances did not amount to a violation until the employer acquired knowledge of them and failed to remedy the problem.³⁴

The Court of Appeals for the Fourth Circuit has also been required to consider whether a claim of sexual harassment is actionable under title

27. *Id.* at 211-212. Miller alleged that she was discriminated against because of her race and sex.

28. *Id.* at 213.

29. *Id.* at 24.

30. 422 F. Supp. 553 (D.N.J. 1976) *rev'd*, 568 F.2d 1044 (3rd Cir. 1977).

31. 422 F. Supp. at 555.

32. *Id.*

33. 568 F.2d at 1048-49.

34. *Id.*

VII. In *Garber v. Saran Business Products, Inc.*,³⁵ a female employee had been fired for refusing to submit to the sexual advances of her male supervisor. The district court dismissed the complaint, and the court of appeals, in a four sentence opinion, reversed declaring "the complaint and its exhibits, liberally construed, allege an employer policy or acquiescence in a practice of compelling female employees to submit to the sexual advances of their male supervisors in violation of title VII."³⁶

In 1981, the District of Columbia Court of Appeals was again faced with a sexual harassment case. In *Bundy v. Jackson*³⁷ the court went a step further than all previous decisions. Bundy alleged that she was continually asked for sexual favors, made the brunt of lewd jokes and that sexual intimidation was a "normal condition of employment."³⁸ Moreover, when she complained to her supervisor's superiors, they not only joined in the "game" but made sexual advances to her as well.³⁹

The court reiterated the position that sex discrimination in employment is not limited to disparate treatment founded solely or categorically on gender; rather, discrimination is "sex discrimination whenever sex is for no legitimate reason a substantial factor in discrimination."⁴⁰

The court, however, went further and addressed the question of whether or not the sexual harassment of the sort Bundy suffered amounted by itself to sex discrimination with respect to the "terms, conditions or privileges of employment."⁴¹ The court answered affirmatively. Relying on numerous decisions involving race discrimination,⁴² the court held that "conditions of employment" include "the psychological and emotional work environment — that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation illegally poisoned the environment" and is violative of title VII.⁴³

35. 552 F.2d 1032 (4th Cir. 1977).

36. *Id.*

37. 641 F.2d 934 (D.C. Cir. 1981).

38. *Id.* at 939.

39. *Id.* at 940.

40. *Id.* at 942.

41. *Id.* at 943.

42. See, e.g., *Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 244 (5th Cir. 1971), *cert denied*, 406 U.S. 957 (1972). Judge Goldberg explained that "terms, conditions, or privileges of employment" is an expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination.... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. 454 F.2d at 238. See also, *Carroll v. Talman Fed. Savings and Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979); *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert denied*, 434 U.S. 819 (1977); *Gray v. Greyhound Line East*, 545 F.2d 169 (D.C. Cir. 1976); *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978); *Steadman v. Hundley*, 421 F. Supp. 53 (N.D. Ill. 1976). It should be noted, however that some courts still require evidence of adverse employment consequences resulting in sexual harassment. See, e.g., *Walter v. KFGO*, 518 F. Supp. 1309 (D.N.D. 1981); *Meyers v. ITT*, 527 F. Supp. 1064 (D. Mo. 1981).

The court went on to declare that a violation of title VII would exist under these circumstances even if the plaintiff did not lose "any tangible job benefits as a result of the discrimination."⁴⁴

In a similar case, *Continental Can Co. v. State of Minnesota*,⁴⁵ the Minnesota Supreme Court held an employer liable under the Minnesota Human Rights Act because it condoned physical and verbal sexual harassment of the plaintiff by her co-workers, again analogizing to racial harassment cases under title VII, in which employers with knowledge of the harassment permitted it to continue. The court observed that sexual harassment is most readily recognized when promotion or retention of employment is conditional on dispensation of sexual favors. The court noted however, that "(it) is as invidious, although less recognizable, when employment is conditional either explicitly or impliedly on adapting to a workplace in which repeated and unwelcome sexually derogatory remarks and sexual motivated physical conduct are directed at an employee because she is a female. (Such behavior) clearly may impact on the conditions of employment."⁴⁶ The court cited the Equal Opportunity Employment Commission's guidelines imposing responsibility on an employer for acts of co-employees if the employer knows or should have known of the conduct.

Two cases exist that raise the tangential concern of liability for acts of non-employees, although in both cases it was a policy of the employer that made the employees vulnerable to harassment by customers. In *EEOC and Hasselman v. Sage Realty Corporation*,⁴⁷ a building management company had bicentennial uniforms designed for its female lobby attendants. The uniforms were ponchos, held at the wrists and sides by snaps and tacks. The plaintiff was required to wear the uniform despite her complaints that it was revealing, sexually provocative, and elicited lewd comments from men passing through the lobby. The court found the employer liable for requiring plaintiff to wear a uniform which could reasonably be expected to lead to sexual harassment on the job and which had no valid business purpose. The plaintiffs in *Marentette v. Michigan Host Inc.*,⁴⁸ were waitresses who protested being required to wear uniforms they considered sexually provocative. Although the case

43. 651 F.2d 934, 945.

44. *Id.* at 945. A similar result is reached in *Brown v. City of Guthrie*, 22 Fair Empl. Prac. (BNA) Cas. 1627 (W.D. Okla. 1980). This case involved a claim by a woman employed as a police dispatcher. The sexual suggestions here were even more offensive than in *Bundy* and included the use of nude pictures and recent videotapes of strip searches of female prisoners. The court cited the EEOC's guidelines in concluding that there had been sexual harassment and, while observing that the exact degree or amount of harassment necessary to impose liability might often be difficult to determine, referred to the EEOC's "Totality of the Circumstances" test.

45. 22 Fair Empl. Prac. (BNA) Cas. 1808 (Minn. 1980).

46. *Id.* at 1813.

47. 24 Fair Empl. Prac. (BNA) Cas. 1521 (S.D.N.Y. 1981), 507 F. Supp. 389 (S.D.N.Y. 1981).

48. 24 Fair Empl. Prac. (BNA) Cas. 1685 (E.D. Mich. 1980).

was dismissed on defendant's motion for summary judgment on grounds of mootness, the court observed that if such uniforms, in fact, subjected employees to sexual harassment, the requirement to wear them was not a reasonable dress and grooming code, but became actionable sex discrimination under title VII.⁴⁹

The most recently reported case is once again from the District of Columbia Court of Appeals. In *Vinson v. Taylor*,⁵⁰ the court reversed and remanded the district court's decision that Vinson had not made out a case of sex discrimination violative of title VII because there was no loss of employment, promotion or disciplinary action taken against her.⁵¹ Furthermore, the district court held that the defendant's employer, Capitol City, could not be held liable for any sexual relationship engaged in by Vinson and Taylor, even if considered a violation of title VII, because it had no notice of the offensive conduct charged to Taylor.⁵²

The court of appeals, in rejecting the district court's interpretation of title VII, reiterated the principles it established in *Barnes v. Costle*⁵³ and in *Bundy v. Jackson*.⁵⁴

1. Abolition of the job of a female employee because she spurned her male superior's sexual advancement is an infringement of Title VII;
2. A violation of Title VII may occur simply for pervasive on-the-job sexual harassment by superiors.⁵⁵

Vinson's grievance was the latter type and an inquiry must be made as to whether or not Taylor created or condoned a substantially discriminatory work environment, regardless of whether Vinson lost any tangible job benefits as a result of the discrimination.⁵⁶ Therefore, the case was remanded so that the lower court could ascertain if, in fact, Vinson was subjected to "sexually stereotyped insults" or demeaning propositions that illegally poisoned the "psychological and emotional work environment."⁵⁷

Turning to the question of employee liability the court declared:

We have no difficulty in concluding that an employer may be held accountable for discrimination accomplished through sexual harassment by any supervisory employee with authority to hire, to promote or to fire. An employer's delegation of this much authority rests in the

49. *Id.*

50. 36 Fair Empl. Prac. (BNA) Cas. 1423 (D.C. Cir. 1985). See also *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1981).

51. 36 Fair Empl. Prac. (BNA) Cas. at 1426.

52. 36 Fair Empl. Prac. (BNA) Cas. at 1427.

53. 561 F.2d 983 (D.C. Cir. 1977).

54. 641 F.2d 934 (D.C. Cir. 1981).

55. 36 Fair Empl. Prac. (BNA) Cas. at 1426.

56. *Id.*

57. *Id.* at 1427.

supervisor such extreme power over the victimized employee that the supervisor's stature as an "agent" of the employer cannot be doubted. We do not believe, however, that vicarious responsibility is limited to discrimination by supervisors so richly endowed. The mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose upon employees For this reason, we think employers must answer for sexual harassment of any subordinate by any superior."⁵⁸

Therefore, the court held the employer liable for Taylor's sexual harassment of Vinson, even though the employer had no direct knowledge of the allegations. Thus, this decision also upholds the EEOC guidelines which hold employers responsible for the actions of their agents and supervisors "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."⁵⁹

In summarizing the title VII cases on sexual harassment, several principles can be delineated:

- Sexual harassment is discrimination based on sex and is a violation of title VII of the Civil Rights Acts of 1964 and as amended in 1972.
- Sexual harassment is behavior towards a person based on their sex.
- The behavior must be unwelcomed by the recipient.
- The victim must be unable to stop the behavior.
- The harassment complained of must have affected a term, condition or privilege of employment, which includes psychological well being in the work setting.
- The harassing behavior must be by someone under the employer's control such as supervisor, agent, coworker or customer.
- The employer knew or should have known that the harassing behavior occurred and chose to ignore the situation.

The above illustrates the evolving state of the law and its interpretation by the courts. In the last decade, courts have been more willing to find sexual harassment a form of sex discrimination and therefore a violation of title VII.

Title IX of the Education Amendments of 1972

In addition to the provisions of title VII, employees of educational institutions, as well as students, have an avenue of redress for alleged sexual harassment under title IX of the Education Amendments of 1972.⁶⁰ The amendments prohibit discrimination on the basis of sex in

58. *Id.* at 1430.

59. 28 C.F.R. § 1604.11(c). For an in-depth review of case law and commentary on sexual harassment, see special symposium volume, 10 Capital Univ. L. Rev. (1981).

60. 20 U.S.C. § 1681(a).

any educational program or activity receiving federal financial assistance. Specifically:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.⁶¹

The accompanying regulations provide protection in the areas of admission and recruitment to schools; educational programs and activities, including access to course offerings; housing and facilities; counseling and financial assistance, health and insurance benefits; marital or parental status; athletics; as well as employment assistance to students and general employment practices.⁶² It is evident that title IX has its philosophical foundations in, and has been modeled after, title VI of the Civil Rights Act of 1964 as well as title VII.⁶³ Thus, when courts are asked to interpret title IX cases, they are likely to refer to previous decisions made in relation to title VI and title VII.⁶⁴

The question of whether title IX applies to the employment practices of educational institutions is one that has had a long and active history in the courts.⁶⁵ The Supreme Court resolved this conflict in the *North Haven Board of Education v. Bell*⁶⁶ decision, by holding that title IX does prohibit sex discrimination in employment practices of educational institutions. The Court reviewed the legislative history, statutory language and administrative interpretations in arriving at their decision. However, the Court left open for future judicial interpretation the question of the manner in which federal financial assistance may be received by educational institutions for title IX to apply.

This interpretation was followed by the Supreme Court decision in *Grove City College v. Bell*⁶⁷ when the Court held:

We conclude that the receipt of BEOGs by some of Grove City's students does not trigger institution wide coverage under Title IX. In purpose and effect, BEOGs represent federal financial assistance to the College's own federal aid program, and it is that program that may properly be regulated under Title IX.⁶⁸

61. *Id.*

62. Educational Amendments of 1972 § 901.

63. 42 U.S.C. §§ 2000d, 2000e.

64. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Guardians Ass'n v. Civil Serv. Comm. of New York*, 103 S. Ct. 3221 (1983).

65. See *Dougherty County School Sys. v. Harris* 662 F.2d 735 (1980); *Seattle Univ. v. United States Dep't of Health, Educ. and Welfare* 621 F.2d 992 (1980); *Romeo Community Schools v. United States Dep't of Health, Educ. and Welfare* 600 F.2d 119 (1979); *Islesboro School Comm. v. Califano* 593 F.2d 424 (1979); *Junior College of St. Louis v. Califano* 597 F.2d 119 (1979).

66. 456 U.S. 512 (1982).

67. 104 S. Ct. 1211 (1984).

68. *Id.* at 1222.

In light of the *Grove City* case, one may assume that for title IX to apply to employment at the college or university level, the employee must be employed in a program receiving direct federal financial assistance. It should be noted however, that this decision only affects the coverage of institutions of higher education. It has been well settled that title IX applies to employment throughout public elementary and secondary education.

Sexual harassment has been held to violate the provisions of title IX. In the one reported appellate case, *Alexander v. Yale University*,⁶⁹ the court held, "It is clear that plaintiff Price is within the class Title IX was designed to protect..."⁷⁰ Although title IX nor its regulations mention sexual harassment, the court interpreted its application to the fact situation in the same manner that courts have applied title VII to sexual harassment.

By applying the title VII guidelines to an educational setting, it is apparent that it would be illegal to require submission to sexually harassing behavior to be a condition for the successful completion of a course of study or any educational activity. Likewise, conditions that allow or foster nude pictures, lewd jokes, sexual advances, requests for sexual favors or other harassing activities in a school, college or university may be violative of title IX. Educational institutions must learn as employers have, that issues of sexual harassment must be taken seriously and that what constitutes harassment is to a certain extent in the "eyes of the beholder." The victim defines, within the confines of title VII and its implementing regulations, what is harassing behavior.

Elementary and secondary schools have an additional obligation to provide a harassment free environment, as they have minor children who attend their schools, many under compulsory education laws. Schools must assure that the learning environment of their school is free from sexual harassment by administrators, teachers, staff and students. School employees are under the control of the board of education, particularly in their relationship to pupils, but schools must also be in control of pupils to the extent that an appropriate learning environment is maintained.

Schools, as well as employers, should take prompt and corrective action when given notice of sexually harassing behavior. No school should allow or condone sexual advances by an employee toward a student. An occurrence of sexual harassment between a teacher and student adversely affects learning opportunities for the student, places the student in a position of peril and certainly violates professional conduct on the part of the employee.

69. 459 F. Supp. 1. (1977), *aff'd on other grounds* 631 F.2d 178 (1980).

70. *Id.* at 5.

The courts have said title IX applies to employment and that sexual harassment is prohibited by title IX.⁷¹ It is time for educational institutions to examine their policies and practices and to assess to what extent sexual harassment is evident in their corridors, classrooms, and campuses. To wait for complaints from students and charges of discrimination from employees is to ignore a societal concern that is finally being taken seriously and to subvert what should be a goal of our educational institutions — to provide an environment where students may prepare to achieve their educational, personal and career goals.

The following section will present policy recommendations and suggestions for preventing sexual harassment in employment and the school environment.

Recommendations

Employers as well as school districts need to develop policies and procedures to handle complaints of sexual harassment by employees and students as well as take action to reduce occurrences of harassment. School districts may easily amend their existing nondiscrimination policies required under title IX to include provisions for sexual harassment.⁷² Employers, who have no policy concerning harassment, risk allegations that they are insensitive to the issue and may make them vulnerable to allegations condoning sexual harassment.⁷³ The following is a sample policy for addressing harassment:

It is the policy of our company/school district/university that all our employees should be able to enjoy a work environment free from all forms of discrimination, including sexual harassment. Sexual harassment is a form of misconduct which undermines the integrity of the employment relationship. No employee should be subjected to unwanted, unwelcome sexual advances or conduct, either verbal or physical. Conduct that is harassing to other employees will not be tolerated. Such conduct, whether committed by supervisors, nonsupervisory personnel or nonemployees is prohibited. An employee who believes that he or she has been or is being subjected to harassing acts or conduct should bring such acts or conduct to the prompt attention of a supervisor, manager or administrator who is either his or her immediate superior, the personnel authority, or other appropriate management representative.

The above illustrates that a policy should include statements which reflect the following:

- sexual harassment is against employer policy;
- sexual harassment is considered misconduct;

71. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 538 (1982); *Alexander v. Yale Univ.*, 459 F. Supp. 5 (1977); *see also* *Board of Educ. of Alamo-Gordo Pub. School Dist. v. Jennings*, 651 P.2d 1037 (1982).

72. Educational Amendments of 1972 § 901.

73. 29 C.F.R. § 1604.11(f).

- a definition of sexual harassment;
- persons who are affected by the policy; and
- the person or persons who receive complaints of alleged discrimination.

It should be noted that employers must notify their employees of their policies concerning sexual harassment. These policies should be publicized so that employees who believe they are the object of sexual harassment know where they can bring their complaints. School administrators should also provide students and their parents, where appropriate, with district policies concerning sexual harassment and the procedure to be followed in lodging sexual harassment complaints.

The provision of a policy prohibiting harassment in and of itself is not sufficient to prevent sexual harassment. Employers need to establish awareness programs for their employees and/or students. Awareness programs should provide participants with the following information:⁷⁴

- legal requirements regarding sexual harassment;
- employer's policy against sexual harassment;
- an explanation of the complaint procedure;
- employer's duty to report any evidence of harassment;
- employee's responsibility to ensure that his/her conduct does not sexually harass any other employee/student; and
- employees will cooperate with efforts to prevent and eliminate sexual harassment.

Providing and publicizing an awareness program informs all personnel that sexual harassment will not be tolerated within the organization. Informing parents and other community members of this program will reinforce the district's concern for the well being of its students.

Once an individual comes forward with a complaint of sexual harassment, certain actions and procedures are recommended for an investigation of the incident or behavior. An investigation of the complaint should include the following questions:

- "What happened and when did it happen?"
- "Did it affect your work? How?"
- "What were your feelings and what did you do about it?"
- "What is the background of the incident? What documentation do you have?"
- "Did anyone else see or hear the incident?"
- "Did you talk to anyone else about it?"

If you observe an incident of sexual harassment, present your observations to the victim and ask for verification. In both instances, remember to listen attentively to what the victim says, be sensitive to the feelings involved. However, do not promise anything until you listen to the other side of the incident.

74. *Id.* "An employer should take all the steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval and developing appropriate sanctions."

When interviewing the alleged harasser, present the person with the charge or your observation and ask for a response. Investigate by asking questions such as:

- "Describe your interaction with _____ (the alleged victim)."
- "Do you think you have ever done anything that might have caused the alleged victim to feel offended?"
- "To what degree do you think you use sexual language, innuendos, jokes or mannerisms in the work setting?"
- "What are the business reasons for your interactions with the alleged victim?"

Listen attentively to what the alleged harasser says and be equally sensitive to the feelings involved as with the alleged victim. Consider the degree to which the behavior was mutual and reciprocal. Document your interaction with the alleged harasser, do not rely on your memory.

It may be necessary to interview observers or third parties to the alleged harassment. Present your concerns and the basis of the complaint to the observer and request that this matter be kept confidential. Investigate by asking questions such as:

- "What type of interaction have you observed between the alleged victim and the alleged harasser?"
- "From your point of view was the alleged harasser bothering the alleged victim?"
- "Are there others who might be able to comment on their interaction?"
- "Did the alleged victim ever complain to you about the alleged harasser's behavior?"

Again, listen attentively to what the observers say and document your interactions with the observers or third parties.

If your investigation shows that sexual harassment does not exist take appropriate corrective action with the person who made the charge. For the accused person, take appropriate action to maintain or restore his or her credibility. Be supportive of this person with others in the workplace.

If sexual harassment exists it will be necessary to document your findings and take appropriate disciplinary action according to company or school policy. It will also be important to monitor future interactions between the individuals involved. Be aware of the possibility of reprisals by the harasser or victim once appropriate corrective action has been taken.

Investigating complaints of harassment is a difficult but important task. Employees and students must be assured that their complaints will be viewed as a serious matter and will receive proper attention.

Summary and Conclusion

This chapter has presented the statutory and case law concerning sexual harassment in employment and education practices. The

statutory provisions of title VII and title IX were examined and their implementing regulations were highlighted in relation to sexual harassment.

A review of the cases illustrate that the courts recognize sexual harassment as a form of sex discrimination violative of title VII and title IX. The decisions also indicate an increasing willingness on the part of the courts to redress complaints of sexual harassment in employment and in education.

Recommendations and suggestions were also provided to assist in confronting the problems of sexual harassment. A sample policy was presented and the elements of an awareness program were identified. In addition, techniques for investigating complaints and taking appropriate action were discussed.

Sexual harassment affects both men and women. It has no place in employment or education. All employees and students have the right to work and learn in a harassment free environment.

6

Management Prerogatives and the Scope of Public School Bargaining

Grover H. Baldwin

Throughout the history of collective bargaining there has been a problem of what constitutes negotiable items. The conflict arises in the private sector with sections 158(a)(5) and 158(d) of the NLRA posing a recurring battleground between management and labor. Section 158(a)(5) provides for an unfair labor practice if an employer refuses to bargain collectively with the representatives of the employees. While appearing straightforward, the conflict comes when viewed in conjunction with section 158(d), which defines collective bargaining as

the performance of a mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment.¹

The courts have dealt with this conflict and recognize that it will not go away. Justice Stewart, in his concurring opinion in the *Fibreboard* case, felt that

[T]he phrase 'conditions of employment' is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. ... If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.²

Furthermore, Justice Stewart raised the issue of congressional intent in the NLRA and the need for excluding management functions from the bargaining table. However, the confusion and conflict did not end with *Fibreboard*, and subsequent decisions called upon various appellate courts to deal with the issue of congressional intent and set parameters for the scope of bargaining.

In 1967, the Fourth Circuit Court dealt with this issue. It found that it had to examine the intent of Congress in passing the NLRA. At issue

1. National Labor Relations Act §§158(a)(5), 158(d) (1983).

2. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), at 221, 223.

was the price increase by a private contractor for food services in the Westinghouse plant.³ The union objected, feeling that such an increase fell under the rubric of terms and conditions of employment and had to be negotiated. In holding that such an item was beyond the scope of bargaining, the court stated that "it was not the intent of Congress... to sweep every act by every employer with the ambit of 'conditions of employment'."⁴ Rather, the court felt that equating such trifles with the more important areas of negotiations, such as job security, wages, and insurance, was beyond the scope of congressional intent.

However, the problem did not resolve itself, nor did it leave the court's domain. While a cap may have been put on the issue of congressional intent, the dual sections caused problems within other areas. Specifically, the issue was the management functions and the operation of public agencies. As early as 1952 this area was a cause for concern.⁵ In the *American National Insurance Company* case, the Supreme Court dealt with the issue of managerial functions and responsibilities as they pertained to the collective bargaining process. Here, the issue was a grievance procedure that ended in an unlimited arbitration mode for resolving disputes. The company objected, as they felt it was beyond the scope of bargaining. They proposed a management clause that excluded items of promotions, discipline, and work scheduling, as they were management prerogatives and beyond the scope of bargaining. The union objected and claimed an unfair labor practice stating that the management clause denying them their right to bargain on terms and conditions of employment was unfair. The Court, in resolving the issue in favor of management, found that bargaining for a management rights clause that contained certain functions pertinent to the management of the operation was not, *per se*, a violation of the NLRA and did not erode the duties and functions of the Act. Again, the union did not have to agree to the clause at the bargaining table, but mere proposing and demanding that position did not constitute an unfair labor practice. Later, in the *Katz* decision, the Court held that a refusal to negotiate in fact as to any subject within section 158(d), violated section 158(a)(5) even though the employer had a desire to reach an agreement.⁶ However, the Court did not preclude negotiation of a management rights clause.

The second problem lies in the fact that private sector management has more latitude to negotiate than does public sector management. While both have mandatory items that must be negotiated, the public sector management has certain areas that may not be negotiated under statutory restraint. While private sector management *may* choose to negotiate its management rights to achieve labor peace and harmony, similar items may well be outside the realm of possibility for public sector management.

3. *Westinghouse Elec. Corp. v. NLRB*, 387 F.2d 542 (4th Cir. 1967).

4. *Id.* at 550.

5. *NLRB v. American Nat'l Ins. Co.*, 72 S. Ct. 824 (1952).

6. *NLRB v. Katz*, 389 U.S. 736 (1968).

In 1983, the District of Columbia Circuit Court dealt with the issue of promotion rights of employees within the federal government who had been demoted through reduction in force.⁷ The federal agency refused to bargain, as it felt it was inconsistent with federal law (5 USC section 7106) which outlined responsibilities of the agency. These included the right of the agency to hire, assign, direct, lay off, and retain employees and to fill positions from properly ranked and certified candidates for promotion. The union wanted management to negotiate the procedures the agency had to observe in exercising its authority under this section. The court raised the "direct interference" criteria and recognized the dichotomy between substance and procedure. The key was the degree to which the negotiation of procedure impinged on management's right. The confusion is expanded with the merging of management rights, congressional intent, and the rights and responsibilities of the public sector employer in fulfilling its function.

Legislation

While we have seen the beginnings of the problem for the private and federal sector, what does it portend for public sector schools and management? We must begin by looking at the collective negotiations laws for public schools. These laws, while they have been strengthened in terms of specificity of management rights, began by being as vague as the NLRA in defining wages, hours, and terms and conditions of employment. Indeed, it appears that states adopted the NLRA definitions without considering the issues the courts had dealt with in attempting to define negotiable issues.

Typical of the early attempts was the Pennsylvania law, Act 195.⁸ This law provided for negotiations at reasonable times and in good faith concerning wages, hours, and terms and conditions of employment. However, in sections 702 and 706 the Pennsylvania legislature defined a management rights clause and the bounds the public school management could not exceed. Section 702 stated

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours, and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.⁹

7. *American Fed'n of Gov't Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Auth.*, 702 F.2d 1183 (D.C. Cir. 1982).

8. 1970 Pa. Laws 195.

9. *Id.* at 702.

Section 706 added specific item to the management rights, that of the employer's right to hire employees and discharge employees with just cause consistent with existing legislation. This expanded the rights of the employer, but created confusion as to the exact nature of both the scope of bargaining and the management rights clause.

In ensuing years, additional states enacted statutes dealing with collective bargaining and the issue of management rights. Representative statutes indicating attempts to define the management rights of public sector employers include the states of Hawaii, Indiana, Iowa, and Wisconsin. The Hawaii statutes, as of the 1984 amendments, included rights of the public employer to

- (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.¹⁰

While Indiana statutes included wording similar to the Hawaii statute, they added some specifics that have been used to expand the scope of management prerogatives. These included the "responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law" and further included specific rights to establish policy; maintain efficiency in school operations; and take actions necessary to carry out the mission of the public schools.¹¹

A review of Iowa statute finds that it included the above rights, and added others to broaden these areas. The legislature added the power to "determine and implement methods, means, assignment, and personnel by which the public employer's operations are to be conducted."¹²

Another attempt to clarify the area of management rights and the scope of bargaining can be found in the early Wisconsin statute.¹³ In section 111.70(1)(d), the legislature exempted from the scope of bargaining management direction of the governmental unit except as the exercise of such functions affected the wages, hours, and conditions of employment. The statute went further and declared that

[T]he public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure

10. Hawaii Rev. Stat. § 89-9(d) (1984).

11. Ind. Code Ann. § 20-7.5-1-6(b) (1975).

12. 1974 Iowa Acts 1095, 7.

13. Wis. Stat. Ann. § 111.70.

orderly operations and functions within its jurisdiction, subject to those rights secured to public employees.¹⁴

It would appear that these efforts would stop the flow of management rights cases, as states have limited the scope of bargaining by expanding the rights of management. Such is not the case. Even with specific areas within state statutes, suits by public employers and employees seek to limit and expand the scope of bargaining, much as Justice Stewart opined in *Fibreboard*.

The three "tests" that might be used to deduce the management prerogatives in negotiations with employee associations are: (1) legislative intent, (2) balancing, and (3) impact tests that the courts have used in determining the rights of both parties in negotiations.

Legislative Intent

Legislative intent has been a key to define the limits of negotiable items. Courts have looked at the legislative history of the state acts to discern the philosophy and belief of the legislature. This is particularly true where the sections of the various laws are nebulous and lacking in descriptive terms that could guide both parties at the table. One of the cases of the New Jersey trilogy cases — *Dunellen* — used this application.¹⁵ In *Dunellen*, the issue was whether the proper resolution of an attempt to consolidate chairmanships of social studies and English into a humanities department was the proper subject of arbitration. In resolving the *Dunellen* issues, the Supreme Court of New Jersey reviewed the intent of the legislature and declared that

Surely the Legislature, in adopting the very general terms of L.1968, c. 303, did not contemplate that the local boards of education would or could abdicate their management responsibilities for the local educational policies or that the State educational authorities would or could abdicate their management responsibilities for the State educational policies On the other hand it did contemplate that to the extent it could fairly be accomplished without any significant interference with management's educational responsibilities, the local boards of education would have the statutory responsibility of negotiating in good faith with representatives of their employees with respect to those matters which intimately and directly affect the work and the welfare of their employees.¹⁶

The result of *Dunellen* was that assignment of work, outlining schedules, and determination of the types of specialist to employ, all fell within the management prerogative arena.

14. *Id.* at § 111.70(1)(d).

15. *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n*, 311 A.2d 737 (1973).

16. *Id.* at 741.

Further items in the laundry list approach to dispute resolution can be found in the *Aberdeen* case.¹⁷ A South Dakota court rejected items the association wanted included under the mandatory topics area. The items sought included elementary planning time, elementary conferences, teachers' aides, budget allowances, school-wide guidance and counselling services, and mandatory retirement. The court held that these were not material items that could rationally be attached to the legislature's intent of wages, hours, and terms and conditions of employment. The court also indicated that the boards of education should concern themselves with items affecting wages and hours and not be involved with items that were petty, were used for harassment purposes, were not of material substance, or were not directly part of the bargaining process. In 1985, the South Dakota Supreme Court overruled the *Aberdeen* case and expanded the list of management prerogatives previously excluded from negotiations.¹⁸ The policy area included was overtime pay when combined with workload limits. The court said that the overtime must be negotiated when it was beyond a specified limit of teaching periods, subject matter preparations, teaching beyond specified subject matter limitations, and contact time with students at the elementary level. The court based its ruling on the tripartite test found in the *IFPTE* case discussed below.

In examining legislative intent for the negotiations process in Delaware, the Chancery Court held in *Newman* that the legislature did not make state statutes negotiable items in the public schools.¹⁹ Therefore, the claim that the board had to provide a nontenured teacher a grievance hearing was beyond the scope of the negotiations law, as it was not provided for in state statute.

In dealing with teacher transfer policy as an issue in the negotiations process, the Supreme Court of Minnesota held that this was outside the prescribed limits adopted by the state legislature in establishing the negotiations law.²⁰ The court believed that while inherent managerial policy was not clearly enunciated in the law as to the specific items that were mandatorily negotiable, the functions and programs of the employer, organizational structure, and selection and direction and number of personnel, were part of that arena. It was clear, to the court, that in the selection and direction of personnel, the legislature meant that the board should have direction over the broad educational objectives of the district. Transfer was a managerial decision, and hence, nonmandatorily negotiable. However, the criteria and procedures for determining which teachers will be transferred is negotiable, as it directly affects the

17. *Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., Aberdeen ISD*, 215 N.W.2d 837 (1974).

18. *Rapid City Educ. Ass'n v. Rapid City Area School Dist.* No. 51-4, slip op. No. 14522 (S.D. 1985).

19. *Newman v. Board of Educ. of Mt. Pleasant School Dist.* 325 A.2d 387 (1974).

20. *Minneapolis Fed'n of Teachers, Local 59 v. Minneapolis Special School Dist.* No. 1, 258 N.W.2d 802 (1977).

welfare of the teacher. This impact philosophy will be reviewed later in this chapter.

A different tact was taken in Iowa, where the court, in dealing with a laundry list of items, found that the legislature intended to have all negotiable items listed.²¹ In the *Fort Dodge* case, the court held that if it wasn't on the list, it could not be negotiated, and those parties that did negotiate a nonlisted item, would be in violation of the law. The court, in ruling that the school board was correct in not negotiating the issue of a retirement program, held

that the act's wording and legislative history indicated an intent to retain broad employer rights and to carry out specific, narrowly defined, exceptions for mandatory negotiations.²²

This belief was echoed in the *Tri-County* decision, where the Supreme Court of Kansas held that matters fixed either by statute or by Constitution are not negotiable under any circumstances.²³ These items included nondiscrimination; transfer and reassignment; evaluation of employees; dismissal procedures; allocation for books, supplies, and equipment; paraprofessional aides; substitutes (orientation, pay, preparation, qualifications); class size; and teaching materials. In dealing with the issue of number of credit hours needed to move up on a salary schedule and the claim that this was inexorably tied to wages, the Supreme Court of Iowa denied the educational association's claim and established a two-part test for their use.²⁴ This included the fact that "the proposal must come within the meaning of one of the subjects listed as mandatory" and that "there must be no legal prohibition against bargaining on the particular topic."²⁵ Hours, in this sense, did not constitute hours for wages and hence did not meet the first of the two-part test.

Facing declining enrollments, school districts need to take action to preserve the integrity of their organizations. This involves the restructuring of the organization to adequately utilize resources, including administrative personnel. The issue of the effect such reorganization has on the individual, and the place of managerial prerogatives, was addressed by the Supreme Court of Minnesota in 1981.²⁶ In restructuring the organization, and reducing administrative personnel without negotiating terms and conditions of employment, the district claimed that these were managerial rights. The court held that under section 179.66, subdivision 1,

21. *City of Fort Dodge v. IPERB*, 275 N.W.2d 393 (1979).

22. *Tri-County Educator's Ass'n v. Tri-County Special Educ. Coop.* No. 607, 594 P.2d 207 (1979).

23. *Charles City Educ. Ass'n v. PERB*, 291 N.W.2d 663 (1980).

24. *Id.* at 668.

25. *Fort Dodge Community School Dist. v. PERB*, 319 N.W.2d 181 (1982).

26. *Minneapolis Ass'n of Administrators and Consultants v. Minneapolis Special School Dist.* No. 1, 311 N.W.2d 414 (1981).

[A] public employer is not required to meet and negotiate on matters of inherent managerial policy which include, but are not limited to, such as discretion or policy on the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, and selection and direction and number of personnel.²⁷

The decision to decrease administrative personnel as a means of dealing with declining enrollments, and a reduced budget, concern the school district's organization. These are, without question, matters of inherent managerial prerogatives.

A reversal of sorts came about in the *USD 501* case in 1984 when the Kansas Supreme Court ruled on the issue of mandatory bargaining items.²⁸ The Kansas law provided a lengthy list of specific items delineating mandatory items for negotiations. Here, the school board held the belief that if it did not appear on the list, it was not a mandatory item for negotiations and beyond the scope of their responsibility. The court dealt the use of legislative intent a blow by holding that the "topic" approach adopted by the Secretary of Human Resources was a proper approach to determining the validity of an item for negotiations, even when it did not fall within the list outlined by the legislature. The court stated that "[A]ll that is required is that the subject matter... be within the purview of one of the categories listed under terms and conditions of professional service."²⁹ This topic approach was expanded to include a case-by-case approach with the West Ottawa suit that sought to define the limits of mandatory subjects for bargaining under the Michigan law.³⁰

Given the above, it is apparent that the courts have adopted legislative intent as a means of specifically limiting the items that can be considered mandatorily negotiable by employers in public schools. While the policy and structure of the organization may not be mandatorily negotiable, the balance between managements' rights and the effects on the employees is still an area that needs exploration. Before we move to those areas, we need to recall that even where the legislature has adopted specific language regarding the nature of the items that must be negotiated, as times and conditions change within education, so do the courts' attitudes. This was witnessed by the topic and case-by-case approach used by various state courts.

The courts' use of legislative intent is but one means by which items have been declared managerial prerogatives and thus beyond the scope of negotiations. Related to this approach is the act of balancing the interests of the various groups affected by the process. While the impact test deals with the effect of decisions on employers and employees, the

27. *Id.* at 476.

28. *Unified School Dist. No. 501 v. Secretary of Kansas Dep't of Human Resources*, 685 P.2d 874 (1984).

29. *Id.* at 875.

30. *West Ottawa Educ. Ass'n v. Board of Educ.*, 337 N.W.2d 533 (1983).

balancing test includes other persons affected by the negotiations process, and appears to be an outgrowth of the legislative intent approach.

Balancing Test

The balancing test is one that goes beyond the "normal" range of impact (1) to assess the role of the governmental agency within political realities and (2) to assess who has the greater concern for the operation of the district. It takes into account the governmental nature of public school management that is quite different from the private sector negotiations posture. While the NLRA permits mandatory and permissive items for negotiations in the private sector, the permissive sections are limited only by the management's willingness to "give up" certain areas of direct control. This is not the case in the public school arena. Here the role and function of a governmental entity limits the range of permissive items.

This dichotomy is seen in the *West Windsor Township* ruling in 1978 where the Supreme Court of New Jersey recognized the dual role played by governmental entities, including public schools.³¹ These roles include both the employer and governmental policy-making role. In the former, the agency must respond in reasonable fashion to the negotiations process. The court, in viewing the latter role, held that

[T]he determination of governmental policy at the negotiating table or in a grievance resolution procedure is inherently antithetical to our system of government. Only with respect to those matters as to which government acts as an employer are the interests of the public employees sufficient to warrant the slight deviation from the political process resulting from mandatory collective negotiations.³²

This dual role precluded the governmental agency from expansively opening items for negotiations that approached the permissive realm of the private sector employer.

The New Jersey court went further in its ruling in the *IFPTE* case and provided additional guidance in this balancing area.³³ Examining the issues of contracting and subcontracting, transfer and reassignment of workers, and the workweek provisions of the contracts, the court ruled that the effect was a proper subject for negotiations. The court also examined the role and responsibilities of the government as a policy-making body and held that federal precedents from the private sector would be inappropriate as guidelines in government entity cases. The rationale was based on the nature of the government's responsibility as a policy-making body and in light of the competing interests of the state and its employees where an issue would be best decided through the political process. Thus, the court held that issues were negotiable

31. *Township of West Windsor v. PERC*, 393 A.2d 255 (1978).

32. *Id.* at 263.

33. *Local 195, IFPTE v. New Jersey*, 443 A.2d 187 (1982).

where they affected the work and welfare of the employee and "on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy."³⁴ Continuing in the vein established in *West Windsor*, the court found that the requirement of significant interference was designed to balance the interests of the employees and the democratic decision-making powers given the government as elected representatives of the people. Where the governmental policy-making powers would be inhibited by the negotiated agreement, the item was one that could not be reasonably included within the negotiations process.

Turning to the federal government, we find that the USDC for the District of Columbia applied the same rationale found in *West Windsor* and *IFPTE* to the government's requirement to negotiate with federal employees. In *AFGE v. Federal Labor Relations Authority & OPM*, the court held that while procedural aspects of substantive rights of employees under governmental policy must be negotiable items (in this case regarding selection of personnel and reinstatement of RIF'ed personnel, an issue becoming important in schools), the court did not find that all such items fell under this rubric.³⁵ The court applied a direct interference test and was content to assert that a proposal would be nonnegotiable if in its implementation it would directly interfere with the agency's basic right of management. The issue of basic right of an agency to manage the workload, and fulfill the mission of the agency as deemed necessary and basic under the democratic form of government, took precedent over the needs of the employee. The court held that where it is a basic right of management to operate the agency (or school district) in a responsible fashion to the advantage of the taxpayer, that the political process and not the negotiations process is the more appropriate route for public employees to take to change governmental policy. With recognition of the balancing test based on the rights and duties of the governmental agency to manage the operation for the benefit of the electorate, we now turn to the public school and see how this test has been applied.

In *Chambersburg ASD v. PLRB* the issue was a no-smoking rule instigated by the school board.³⁶ The rule applied to all schools and in all places in the schools. Claiming that this was an unfair labor practice, the association and AFSCME (representing the custodial staff) sued for relief. In examining the balance between employee desires and the board's role in establishing an educational policy, the court held that educational policy was served in this instance. The key appears to be the long-standing attention given to the problem by the board. They had

34. *Id.* at 192.

35. Local 32, *AFGE v. Federal Labor Relations Auth. & OPM*, 728 F.2d 1526 (D.C. Cir. 1984).

36. *Chambersburg Area School Dist. v. PLRB*, 430 A.2d 740 (1981), *cert. denied*, 446 A.2d 603.

previously established an ongoing school program against smoking, made the policy part of the regulatory scheme for the students, sought to have adults model appropriate behavior for students, and granted recognition to nonsmokers' rights. Due to the educational policy precedents that had been established, the court found that these concerns of the board outweighed the instant concerns of the employees.

In matters that deal with constitutional rights of individuals, even where they affect the work and welfare of individual employees, these rights must be protected to the exclusion of that item from the negotiations process. In dealing with the item of racial discrimination in hiring, the New Jersey Superior Court looked at the extent to which the negotiations of the item would impair the determination of governmental policy, in this instance, not only local school board, but national policy as well.³⁷ In holding that there were three categories of items for the collective negotiations process (mandatory, permissive, and illegal), the court found that such an item as the one under scrutiny, could not be a legitimate negotiations item. The rationale offered was that

[W]hen the dominant issue is (a governmental) goal, there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration ... even though this may affect or impact upon the employees' terms and conditions of employment.³⁸

Thus, where a larger goal is at issue, even the effect of the item on the employees' rights does not outweigh the goal of the governmental entity to fulfill its obligations to the Constitution and to the electorate.

Lastly, in the balancing realm we deal with the *Wright* decision.³⁹ While the Supreme Court of New Jersey held for *Wright* in his attempt to be reinstated with tenure according to the contract provisions negotiated by the board, the court did establish a "significance" criterion useful in determining further management prerogatives. Recognizing that all policy decisions by school boards would affect employees, the court felt that the key was to strike a balance between the interests of the public employee and the requirements of the democratic decision-making process. To do this, the court believed that items would be found to be nonnegotiable where they significantly interfered with the prerogatives of management. In determining significance, the court found that it rested predominantly on the extent to which students and teachers were involved. Where students were involved to a greater extent than the employment rights of teachers, the court held that the item was a management prerogative and beyond the scope of negotiability. In this case, which turned on a contract provision that was in contravention to state statute, the court held that as the tenure statute did not preempt the board's power to grant tenure after the three-year probationary

37. *Teaneck Bd. of Educ. v. Teaneck Teacher's Ass'n*, 448 A.2d 487 (1982).

38. *Id.* at 491.

39. *Wright v. Board of Educ. of East Orange*, 491 A.2d 644 (1985).

period, it was a permissive item for negotiations which did not significantly interfere with educational policy. Thus, one could negotiate beyond the state statute unless strictly prohibited from doing so. Furthermore, once the contract was agreed upon, the board had to live with the results. Thus, the significance criterion was established and provides a basis for determination of what a board must, may, or must not negotiate.

Impact Test

The third major test applied by the courts is the impact test. While alluded to in the discussion on balancing, it does provide a separate and distinctly different approach to items as they are examined in a topic, or case by case, approach and the effects on the parties are considered.

There are several cases from the private sector that demonstrate the impact test and provide guidelines for its use by the courts. These are divided into two different realms — management concerns of an entrepreneurial nature and specific issues pertinent to the negotiations process. In the *Transmarine* case, the Ninth Circuit Court looked at the right of management to restructure the company due to the changed economic conditions.⁴⁰ Here the company decided to restructure the firm and reinvest the capital in another enterprise in a different location and sought to have this "right" not be part of the negotiations process. Basing its ruling on both the *Royal Plating and Polishing Company* and the *Rapid Bindery* decisions, the court held that a decision of this type, dealing with such a fundamental issue as the basic direction of the company, was not a proper subject for mandatory collective bargaining.⁴¹ However, the court did recognize the necessity of the company to bargain about the effects of the decision on the employees as it covers such issues as severance, vacation pay, insurance, seniority, and pension issues. Thus, the basic management decision about the structure and direction of the firm was not negotiable, but the effects of the decision were proper subjects for negotiations. While singularly a private sector matter, the basic principles do apply to public school operations within the management and governmental policy realm.

This decision was echoed in the *International Harvester* decision by the Ninth Circuit Court in 1980.⁴² The court again held that the reorganization of the firm was not a negotiable decision. However, the effects of the decision on the wages, hours, and terms and conditions of the employees were negotiable items. The court said

[M]anagement decisions that fundamentally alter the direction of an enterprise, or involve significant reallocation of capital generally are

40. *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967).

41. *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).

42. *NLRB v. International Harvester Co.*, 618 F.2d 85 (9th Cir. 1980).

not considered decisions concerning terms and conditions of employment and are not mandatory subjects of bargaining.⁴³

In negotiating the effects of the policy decision, the court was most concerned with the procedures for layoffs, reimbursement, and the other aspects that the decision would have on employees.

These two decisions have impact on public school management rights and prerogatives. Faced with declining enrollments, teacher shortages, financial exigency, school management and policy setting bodies need to adjust their operations to more efficiently and effectively fulfill their responsibilities to the students and patrons of the district. Using the rationale from these cases would permit these bodies to make the changes necessary. While they would not have to negotiate the issues, they would provide for the effects they have on personnel.

The issues raised in the private sector cases have risen in the public school arena, with the application of the impact test resulting in decisions similar to the "effects on employees" cited above. One of the earliest cases dealing with the distinction between board and employee rights, was that of *Seward*.⁴⁴ In appealing the *Industrial Relations Board's* ruling, the Supreme Court of Nebraska held that boards of education should not be required to negotiate matters that are of predominantly educational policy. More specifically, the court held that even while there are many diverse interests involved, only matters that can be interpreted as directly affecting the teachers' welfare were negotiable. Matters beyond the realm of negotiability, and in the management sector, included the right to "hire; schedule work; control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed."⁴⁵ Tied to the *Seward* decision was the reliance on what the legislature indicated as the guiding principles under the terms and conditions of employment section of the law. Furthermore, the court was keenly aware of the need to protect the teachers on matters that had a direct impact on their welfare. The key appears to be the direct impact on the teachers as opposed to others within the district, as well as on educational policy.

While traditional school policy involving managerial prerogatives is thought to be limited to "on-school" time, the *Mainland* case saw the court expand the notion of educational policy to time after school.⁴⁶ In 1978, when a number of states had included extracurricular activities as negotiable items (when associated with extra pay provisions in contracts), the Superior Court of New Jersey ruled that these were an integral part of the learning process and fell under the umbrella of

43. *Id.* at 87.

44. *School Dist. of Seward Educ. Ass'n v. School Dist. of Seward*, 199 N.W.2d 752 (1972).

45. *Id.* at 759.

46. *Mainland Regional Teachers Ass'n v. Board of Educ. of Mainland Regional School Dist.*, 423 A.2d 998 (1978).

management prerogatives. The court found that extracurricular activities were not really extra, but co-curricular. They were part of the learning environment provided by schools to enrich the learning of students and augment the standard curriculum. New Jersey, with the thorough and efficient education policy, led the court to rule that these activities were part of the curriculum and, as the board has the "duty to assign staff to educational programs and make the best assignment for the good of the education program and to provide for a thorough and efficient education program," this item was nonnegotiable.⁴⁷ Even when the impact of the board's action directly affected the welfare and working conditions of the teaching staff, the larger question was raised as to the impact of the proposal on the total education program.

This stance was reiterated by the California Supreme Court in *San Mateo*.⁴⁸ The issue was the board's position that the negotiable items were more limited than those established under the Winton Act. The court held that the Educational Employment Relations Act provided for negotiable items not limited to those found in the Act. The court held that the

[S]ubject is negotiable, even if not specifically enumerated in the Act, if it is logically and reasonably related to wages, hours, and terms and conditions of employment; if the subject is of such concern to both management and employees that conflict is likely to occur and mediatory influence of collective negotiations is the appropriate means of resolving the conflict and if the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives, including matters of fundamental policy essential to achievement of the school district's mission.⁴⁹

As indicated by this decision, the rights of management were left in a state of confusion over exactly what could logically be considered within the legislative prescriptions pertinent to negotiations. The decision also opened another area for our consideration, that of proper mediatory influences in the collective bargaining process. Does this mean that arbitration and arbitration decisions will also affect the management prerogatives of school districts?

Three cases deal with this issue—*Ridgefield Park School Committee of Boston*, and *Iowa City Community School District*.⁵⁰ The *Ridgefield Park* case declared that the use of arbitration as a means of dispute settlement overstepped the bounds of reasonableness when the issue was one of management prerogative, even where the board had negotiated a clause calling for grievance disputes to be resolved using binding arbitration. At the same time, the board agreed to clauses dealing

47. *Id.* at 1000.

48. *San Mateo City School Dist. v. PERB*, 191 Cal. Rptr. 523 (1983).

49. *Id.* at 528.

50. *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 393 A.2d 278 (1979); *School Committee of Boston v. Boston Teachers Ass'n*, 399 N.E.2d 970 (1979); and *Iowa City Community School Dist. v. Iowa City Educ. Ass'n*, 343 N.W.2d 139 (1983).

with teacher transfer and reassignment. When the board violated the agreement, the association sued for relief. The Supreme Court of New Jersey held for the board, but not for the reasons that the board proposed. Determining that the items of transfer and reassignment were nonnegotiable, the court declared that as they could not be negotiable, and thus they could not be arbitrated. The board was cautioned against further negotiating of items prohibited by law. This ruling affects all school districts, as it reinforces the position of not negotiating legislative enactments, such as transfer and reassignment of teachers. Yet, the option of the use of arbitration was raised here. When might arbitration be used, and upheld by the courts, even where it impacts on managerial prerogatives? The next two cases allude to an answer.

In *School Committee of Boston v. Boston Federation of Teachers*, the issues were specific appointment and tenure decisions, as well as the school committee's decisions to abolish positions. The Supreme Court of Massachusetts ruled that these subjects were within the zone of management prerogatives, but that arbitration awards would be upheld where the issues raised were ones of adherence by the school committee to the procedures set forth in the negotiated agreement. Thus, school boards are cautioned (1) to negotiate carefully the procedures they will follow, and (2) to follow the procedures particularly where a grievance procedure ends in binding arbitration.

The *Iowa City* case further expanded the possibility of arbitration awards affecting management prerogatives, and opened the door for the use of this technique to resolve conflicts involving permissive items. This included items that were managerial prerogatives that boards of education negotiated away. In this case, the issue was the board's action of freezing a teacher's pay for unsatisfactory performance. Due to the steps in the grievance procedure, arbitration was used. The arbitrator ruled for the teacher and the board sought to have the decision overturned. In upholding the arbitration award, the court rejected the board's arguments that they alone could determine the criteria for unsatisfactory performance and that this item was not included in the list of mandatory bargaining items. Furthermore, the court expanded the list of items by declaring that the restrictive interpretation of mandatory items does not inhibit the board from voluntarily bargaining, and agreeing on, permissive topics. The decision relates to the private sector argument of the firm to permissively negotiate whatever it wants. The only strictures placed on boards of education were those items expressly prohibited to it by the legislature. The court also examined the favorable view given by the state legislature to arbitration as a means of resolving grievances. Thus, care must be exercised by school management personnel in the items that are permissively negotiated and the intertwining of these items with other portions of the negotiated agreement.

The opinion of the Iowa court, that school boards may negotiate what have been termed management prerogatives and be held accountable

for their actions if they violate the contractual arrangements, opens another area for management rights. In looking at management's responsibility to operate the city in response to the avowed governmental functions expected by the electorate, the court held that while the management was not required to negotiate matters of inherent managerial policy, it could do so on a voluntary basis.⁵¹ Yet, when it does negotiate this area, "it must do so in clear and unmistakable language."⁵² This clear and unmistakable language requirement arose in the *NEA-Wichita* case over a management rights clause that had been inserted into the contract.⁵³ Here the school management had negotiated a management rights clause and a closure clause that not only gave the board broad management rights, but brought closure to the negotiations process and no further negotiations would occur without mutual consent. The Supreme Court of Kansas ruled that the clauses were too broad and vague, that they extended the rights of management beyond the limits outlined within the law, and that while permissive aspects of negotiations allowed both sides to negotiate items not prohibited, the final contract had to be narrowly drafted, include the specific items, and not encompass the broad scope that was found in this particular situation. The court's rationale was that the law was meant to facilitate negotiations and not limit the rights and responsibilities of either party in maintaining the work and welfare of the employees. Thus, we see that while either side may permissively give up, negotiate, or agree to specific items that limit their powers, including managerial rights, they must neither be beyond the scope of the statutes nor be restrictive to either the policy functions of the board nor the rights of the employees.

If the school board may negotiate matters of policy, must negotiate matters pertinent to the work and welfare of the employees, and must not overstep their responsibility as a governmental policy-making body, what specific aspects must be negotiated that border upon, or fall within, the policy purview of the board? While many courts have held that management rights need not be negotiated when they directly affect the policy making requirements of the boards, the courts have held that the procedure for implementation of the policy needs to be negotiated, especially where it directly affects the employees.

In 1980, the Oregon Supreme Court dealt with the issue of teacher evaluation and the responsibility of the Employment Relations Board to expand the provisions of the negotiations act as opposed to using only the list provided in the act.⁵⁴ The court found that the three criteria established by the ERB were useful in determining the negotiability of items. The test consisted of basis and uses, mechanisms, and minimum fairness. Applying these to the issue of teacher evaluation, the ERB

51. *Armstrong Pub. Serv. Union v. City of Duluth*, 336 N.W.2d 68 (1983).

52. *Id.* at 72.

53. *NEA-Wichita v. Unified School Dist. No. 239*, Sedgewick County, 624 P.2d 429 (1983).

54. *Springfield Educ. Ass'n v. Springfield School Dist. No. 19*, 621 P.2d 547 (1980).

found (and the court sustained) that under the first two criteria — basis and uses and mechanism — these were related predominantly to the educational policy functions of the school board. While these affected the employees and their work, they related primarily to the educational program of the district and were not mandatory bargaining items. They were considered permissible items at best. The rationale for this was the belief that educational policy included program standards of the curricular nature and that these were inextricably interwoven into the level of effectiveness that the board was prone to maintain as part of its management rights as program standards, and their maintenance would serve as the basis for subsequent managerial action. Thus, while the court sustained the minimum fairness procedural aspects of the teacher evaluation process, the program aspects dealing with fulfillment of the mission given the board by the electorate was reserved for its action alone.

In the *Drummond* case, the board had adopted a nepotism policy and released a bus driver under the policy.⁵⁵ The Wisconsin Employment Relations Commission held that the policy had to be negotiated as it affected hours, wages, and terms and conditions of employment. The Court of Appeals in Wisconsin, in upholding for the WERC ruling, believed that both the policy and its impact were subjects for bargaining. The court concluded that the board was required to bargain over the applicability of the policy to employees generally, rather than limiting the negotiations to the actual impact upon the only employee affected. At least, the court felt, the board must confer regarding whether it should be adopted and what it should say.

This need for negotiation of procedural aspects of policy decisions was further illuminated in the *Old Bridge Township* case.⁵⁶ While the Supreme Court of New Jersey was not concerned with the policy decision of the board to reduce its staff in the face of declining enrollments and financial exigency, the court did rule on the impact of the policy and the need to negotiate procedures. The court was concerned with the rudimentary fairness to the employees and the establishment of equitable practices to implement the policy. As the procedures affected the individual employee, and the association at large, they were declared negotiable items. Specifically, the court stated

[T]he dominant managerial concern here is the decision to abolish the position. That cannot be negotiated. The question is whether the employees' interests in procedurally fair notice of the layoff can be balanced with the employer's interest in fiscal management.⁵⁷

The state statutes provided for nontenured staff nonrenewal, and this was not negotiable. However, when the question involved the impact of

55. *School Dist. of Drummond v. WERC*, 352 N.W.2d 682 (1984).

56. *Old Bridge Township Bd. of Educ. v. Old Bridge Educ. Ass'n*, 489 A.2d 159 (1985).

57. *Id.* at 165.

a reduction in force, the court held that the board had to negotiate not only the procedures for RIF, but financial rewards if they were late in meeting the notification deadline. The need for fairness in dealing with the implementation of the policy did not cause interference with the governmental prerogative of operation of the district. The issue is negotiable not only when the impact of the item is greater on the employee, but also when the implementation of the policy causes that impact.

Summary

With this examination of the scope management prerogatives and the tests that are used to determine the extent to which management must negotiate specific items, just what guidelines are there for school board responsibilities in the negotiations process?

First, in examining the legislation that has been promulgated by the states, we find that the scope of bargaining ranges from narrow restrictive lists to wide-ranging general statements concerning what must, may, and must not be negotiated. While an unsettled area, the general tenor is that certain aspects in the management prerogative realm do exist. These items do include the power to direct employees; oversee budgets and allocations; provide for proper organizational structure; hire, assign, transfer, and dismiss employees; and maintain an acceptable standard for services provided by the district. The problem arises when the statutes are general and include limited guidance for school management personnel. It is in those instances that rational connections must be drawn by the school officials and other tests used to determine the scope of their powers.

The second issue follows from the legislation that states have enacted. This test is that of legislative intent. Using this as a base, the courts dealt with the issue of what constitutes management prerogatives within the scope of bargaining. The results of these analyses are that the prerogatives of management are basically broad in scope and that these include most aspects of policy making and operation of the district in fulfillment of its educational mission. In most states, the legislative intent has been read to give broad powers to the school boards and in many instances restrict the mandatory items to those specifically enumerated.

The next area was the balancing test in which courts examined issues found within the scope of bargaining and balanced the effects of the issue on various groups within the school community. This approach has led the courts to consider the governmental policy-making nature of the school board and the overall mission it is to fulfill. Furthermore, courts have examined the issues in light of the differences found between the private sector enterprise that might be permitted to negotiate away its managerial rights versus the public entity that is more restricted due to the democratic and political function it fulfills. One aspect of the balance-

ing process does include the fairness in implementing the policy that the school board legislates.

Finally, examination of the impact test found that the courts examine the issues in dispute and determine whether the school management or the school employee is affected more by the issue. Here the courts appear to rely on the specific wording of state statutes, and on rational decision making. As long as the statutes prescribe, or limit, the realm of negotiable items, the school management team must, and may, remain within that area. The issue of fairness is the key to the rational approach used by the courts. With respect to issues that are included within the negotiated contract, and where arbitration is used to resolve contract disputes, the courts have held that they will permit such procedures as long as the outcome does not impinge upon the management prerogative of policy making.

There are some specific guidelines to the rights and prerogatives of management, and there are tests that courts use in determining management prerogatives. However, the area is still gray in terms of any definitive statement on exactly what the limits are at any specific time. On a philosophic note, it does appear from both the legislative and judicial realm that the trend is moving toward more management prerogatives and a lessening of conflict in those areas of educational/governmental policy making. Both courts and legislatures are becoming concerned with the need for the school management teams to fulfill the goals and mission demanded by the patrons of the district. To that end, decisions seem to be broadening the area of management prerogatives.

Collective Bargaining: Management Prerogatives, Unfair Labor Practices and Grievances

Rodney Freeman, Jr.

While this article is limited to unfair labor practices and grievances, a complete understanding of the same cannot be gained without a discussion of collective bargaining in the public educational sector. Thus, an examination of the past, present, and future of these three topics will follow. But first, a brief look at the historical relationship between educators and their employers is perhaps in order.

In ancient Rome, Greek slaves were utilized as teachers. The apt Romans knew that the minds of Roman children, which represented the future of the empire, were being entrusted to the teachers; the power of absolute control, however, had to remain with Romans. While the concept of teachers as slaves gradually disappeared, students of colonial American history will recall that the early colonists provided education for their families by frequently employing indentured servants who sold their education and teaching skills for passage to America. This concept also gradually disappeared, but the extreme paternalism toward teachers remained. Everyone in education can remember from a mere generation or two ago, the requirements of remaining single, going to church, trimming the wick and tending the fire. This list could go on and on, but would be redundant since all know or knew of teachers who lived under this paternalistic system.

And while this paternalistic attitude was not limited to teachers and other public employees, teachers lagged far behind their counterparts in the private sector in acquiring the ability to control their destiny. In fact, nearly thirty years after private employees had been given the right of collective bargaining, the Supreme Court of Kansas said:

The entire matter of qualifications, tenure, compensation and working conditions for any public employee involves the exercise of governmental powers which are exercised by or through legislative fiat. Under our form of government public office or public employment cannot become a matter of collective bargaining and contract.¹

1. *Wichita Pub. Schools Employees Union v. Smith*, 397 P.2d 357 (Kan. 1964).

The Past

In accordance with its constitutional power to regulate interstate commerce,² the United States Congress enacted, on July 5, 1935, the National Labor Relations Act.³ This act and its primary amendments⁴ were predicated upon certain findings and policy statements that are significant to an understanding of the current status of unfair labor practices and grievances.

Specifically, Congress found that when employees are denied the right to organize and collectively bargain with employers, strikes and other forms of industrial strife occur, which substantially impair and disrupt the commercial flow of goods in the United States. Congress further found that the inequality of bargaining power between unorganized employees and employers who were organized in corporate forms of association tended to aggravate business depressions by maintaining low wages and depressing the purchasing power of wage earners.

Congress then found that organized employees who are protected by law with collective bargaining safeguards promote the flow of commerce by encouraging friendly adjustment of industrial disputes concerning differences as to wages, hours, or other working conditions. Finally, in the 1947 amendment, Congress found that certain practices by labor organizations also burden and obstruct commerce through strikes and industrial unrest and that the elimination of these practices was necessary. Therefore, Congress declared, as a policy of the United States, that it was necessary to eliminate the causes of the above obstructions to the free flow of commerce and to encourage the practice and procedure of collective bargaining.⁵

Congress excluded, however, from the definition of "employer" and, thus, the NLRA itself, the United States, all wholly owned government corporations, the Federal Reserve Bank, and the states and their various political subdivisions.⁶ Public employees, including public school district employees, as a consequence, were denied the rights and protection that Congress found necessary for their private counterparts.

In an attempt to explain the NLRA's exclusion of public or government employees, President Franklin D. Roosevelt, in a letter written to the National Federation of Federal Employees on August 1, 1937, set forth the fundamental characteristics which the President felt distinguished public employees from private employees. Roosevelt stated:

[A]ll government employees should realize that the process of collective bargaining as usually understood, cannot be transplanted into the public service. It has its distinct and unsurmountable limitations when

2. *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453 (1938).

3. 29 U.S.C. §§ 151-169 [hereinafter referred to as NLRA].

4. Taft-Hartley, 61 Stat. 136 (1947) and the Landrum-Griffin Amendment, 73 Stat. 541 (1959).

5. 29 U.S.C. § 151.

6. 29 U.S.C. § 152(2).

applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, by laws which establish policies, procedures, or rules in personnel matters.⁷

Even through the 1940s and 1950s, Roosevelt's position remained entrenched, not only in the United States Congress and state legislative bodies, but in the courts as well. In fact, in 1947 the Missouri Supreme Court reiterated President Roosevelt's position by holding that "A public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare."⁸

By the mid 1970s however, the sacrificial nature of public employment espoused by Roosevelt, the Missouri Supreme Court, and others was in large part rejected; thirty states had adopted statutory schemes relating to negotiations and labor relations between governmental employees and their employers.⁹ These statutes were due, in many instances, to an unprecedented period of public employee labor strife in the 1960s.¹⁰ Each of these statutory schemes appears cognizant of the findings and policy statements set forth by Congress in the NLRA, although they vary widely in the manner used to correct labor difficulties in the public sector.

7. *Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ.*, 215 N.W.2d 837 (S.D. 1974).

8. *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947).

9. Alaska Stat. §§ 14.20.550-.610 (1975) Cal. Educ. Code §§ 3540-3549.3 (West Supp. 1976); Conn. Gen. Stat. Rev. §§ 10-153 a-h (1975); Del. Code Ann. tit. 14, §§ 4001-4013 (1974); Fla. Stat. §§ 447.201-.607 (Supp. 1974); Hawaii Rev. Stat. §§ 89-1 to -21 (Supp. 1974); Idaho Code §§ 33-1271 to -1276 (Supp. 1975); Ind. Code §§ 20-7.5-1 to -14 (1975); Iowa Code Ann. §§ 20.1-.28 (Cum. Pamphlet 1975); Kan. Stat. Ann. §§ 72-5413-5425 (1972); Me. Rev. Stat. Ann. tit. 26, §§ 961-72 (Supp. 1974); Md. Ann. Code art. 77, § 160 (1975); Mass. Gen. Laws Ann. ch. 150E, §§ 1-15 (Supp. 1975); Mich. Stat. Ann. § 17.455 (1975); Minn. Stat. Ann. §§ 179.61-.76 (Supp. 1975); Mont. Rev. Codes Ann. §§ 59-1601-1617 (Supp. 1975); Neb. Rev. Stat. §§ 79-1287-1295 (1971); Nev. Rev. Stat. §§ 288.033-.270 (1975); ch. 490, (1975) N.H. Sess. Laws 603-11, reported in Gov't Empl. Rel. Rep. (BNA) RF-108, at 53-57 (August 25, 1975); N.J. Stat. Ann. §§ 34:13A-1-13 (Supp. 1975); N.Y. Educ. Law §§ 200-214 (McKinney Supp. 1975); N.D. Cent. Code §§ 15-38.1-15 (1971); Okla. Stat. Ann. tit. 70, §§ 509.1-10 (1972); Or. Rev. Stat. §§ 243.650-.772 (1974); Pa. Stat. Ann. tit. 43, § 1101.101-.2301 (Supp. 1975); R.I. Gen. Laws Ann. §§ 28-9.3-16 (1969); S.D. Comp. Laws Ann. §§ 3-18-1-17 (1974); Vt. Stat. Ann. tit. 16, §§ 1981-2010 (Supp. 1975); 1975 Wash. Laws ch. 288, 1st Ex. Sess. 1227; 1975 Wash. Laws ch. 5, 2d Ex. Sess. 6, reported in Gov't. Emp. Rel. Rep. (BNA) RF-112, at 35-41 (July 10, 1975); Wis. Stat. Ann. §§ 111.70-.71 (1974).

10. South Dakota, e.g., experienced labor difficulties involving public employees in the mid 1960s, including strikes in 1968 by police officers and firefighters in Sioux Falls and public school teachers in Rapid City. Due to this strife in the public sector, the South Dakota legislature in 1969 adopted the Public Employees' Union Act, SDCL 3-18. Although frequently thought of as a conservative northern plains state, South Dakota's statutory scheme parallels the NLRA as closely as any state which has adopted public labor relations laws.

It appears, for most public employees, that the sacrificial days are over, as the cumulative thirty-year effects of the NLRA begin to merge with state statutes in providing rights and protection to public employees.

The Present

The NLRA, on behalf of private employees, protects the right to form and join labor organizations; to designate representatives for purposes of meeting and negotiating; and to engage in good faith bargaining. Employers may not interfere, restrain or coerce employees to join or refrain from joining labor organizations, nor may they dominate, interfere or assist in the formation of an employee organization. Finally, the NLRA prohibits an employer from discriminating in the hiring, tenure, employment, or discharge of employees based upon labor organization activity or the filing of a complaint or testimony. Similarly, an employee organization commits an unfair labor practice if it, or its agents, restrain or coerce an employer in the selection of its representative or causes the employer to discriminate against employees. The employee organization must also negotiate collectively in good faith.

As noted earlier, all state statutes dealing with public employee labor relations bear some resemblance to the NLRA. The rights and restrictions set forth above sharply parallel recent judicial activity in the area of unfair labor practices and grievances. Since 1981, most educational unfair labor practice complaints and grievances reaching appellate court level in the United States, with few exceptions, can be grouped into seven broad categories, which parallel the NLRA itself:

1. Restraint or coercion in the exercise of protected rights;
2. Discrimination;
3. Employment;
4. Failure to abide by collective bargaining agreement;
5. Refusal to bargain;
6. Unilateral changes in wages or conditions of employment;
7. Non-membership in employee organization; rival organization; and assistance to employee organizations.

While unfair labor practice complaints generally deal with the collective bargaining process itself, many of the complaints seemingly assume the guise of grievances by dealing with the implementation or interpretation of the bargained agreement. Thus, with the exception of those grievances dealing with an employee representative's failure to properly represent an employee, both unfair labor practice complaints and grievances can be categorized as set forth above.

What guidance, then, do these seven categories, and the recent cases contained in each, provide to those who must grapple with the issues?

Restraint or Coercion

While the NLRA and most state statutes provide that public employees have a right to form, join, and participate in labor organizations free from restraint or coercion by employers, the court in New York has taken this statutory protection one step further by providing the protection prior to the time that public employees are actually organized into a unit. In fact, employees are protected who are not seeking to form an employee organization at the time.

In *Rosen v. Public Employment Relations Board*,¹¹ the petitioner, Francine Rosen, was a public teacher at a New York state community college. In September 1980, Rosen was chosen by several of her fellow teachers to voice concerns about various aspects of their employment to the associate dean. Throughout the intervening years, including 1982, Rosen continued her attempts to resolve the teachers' concern with the terms and conditions of employment; however, in January 1983, Rosen's working hours, and thus her salary, were reduced because of her efforts. She challenged this action before the state Public Employee's Relations Board charging that the college unlawfully interfered with her right to form an employee organization and attempted to coerce and restrain other employees from exercising their protected rights. The board found that Rosen's conduct was not protected since there was no indication in the record that the teachers were seeking to form an employee organization or to be represented by such an organization.

The Supreme Court thought differently, holding that if employees were to have a right to form a union but could be fired or coerced by their employer for complaints that are voiced prior to organization, then the right to organize is illusory. Further, the court felt that if persons who were not yet organized saw the effect their complaints had upon the group's leader, this would have a chilling effect upon the exercise of a protected activity. Thus, the court extended the protection against restraint or coercion from that of existing labor organizations to individuals acting prior to organization itself.

In yet another decision, *Profitt v. Wayne-Westland Community Schools*,¹² the Michigan court, interpreting its state Public Employment Relations Act, determined that a teacher union representative's breach of duty to fairly represent the teacher plaintiff's grievance and enforce contractual provisions was an unfair labor practice in that it resulted in an employee's unwillingness to participate in the union, thereby restraining or coercing employees in their right to engage in protected concerted activity.

Finally, in *Association of Independent Professionals v. Maine L.R.B.*,¹³ the Supreme Judicial Court of Maine struggled in attempting to balance the first amendment rights of an employer against the em-

11. 490 N.Y.S.2d 705 (Sup. Ct. 1985).

12. 364 N.W.2d 359 (Mich. Ct. App. 1985).

13. 465 A.2d 401 (Me. 1983).

ployees' right to be free from restraint or coercion in organizational matters. In that case, a certified bargaining unit for the University of Maine faculty, an affiliate of the National Education Association, entered into a collective bargaining agreement with the university that provided check-off and maintenance of membership fee options. Some faculty members failed to select any of the options and the bargaining unit threatened legal action to require selection of one of the options.

Several of the faculty members against whom legal action was threatened formed the Association of Independent Professionals with a goal of acting as a focal point for information on available alternatives to the fee option check-off. The association published certain flyers which the Maine Labor Relations Board found contained false and misleading information that interfered with the collective bargaining agreement and the certified bargaining unit. However, on appeal to the court, while agreeing with the board's conclusion that distribution of the flyer constituted an unfair labor practice, the court vacated the board's cease and desist order since it impermissibly restricted the association's freedom of expression. The court went on to note that there was insufficient evidence presented to show that the labor stability or school environment of the university system was threatened or that specific interference with university operations had resulted.

As can be seen, the burden of proof in this category increases as the restraint nears or crosses the path of other protected interests. This pattern also emerges in the following category.

Discharge

Several recent decisions in this area have all supported the premise that it is an unfair labor practice to discharge an employee if anti-union animus was a substantial or motivating factor in that discharge. Each case tends to localize this broad generalization, however, and must be revised for each jurisdiction. In *Maram v. Universidad InterAmericana de Puerto Rico*,¹⁴ the court felt there was substantial evidence, both circumstantial and direct, indicating that the discharge was motivated by union activity. To quote the court:

We recognize that, on the clear record, there could well have been a sound and supportable business basis for contracting out the janitorial services quite apart from the union, and that University's antedating the exhibit was merely an unwise attempt to paint the lily. However, a use of a faulty firearm must risk a backfire.

Thus, the discharge of the entire university janitorial workforce in the face of unionization was clearly an unfair labor practice of much greater magnitude than a case where only a handful of selected organizers are involved. Again, the court said: "The union, without early relief, may well be done for."

14. 722 F.2d 953 (1st Cir. 1983).

In *Southern Worcester County v. Labor Relations Commission*,¹⁵ the Massachusetts Supreme Court also adopted this "but for" test, holding that it strikes an equitable balance among the interests at stake. The employer is not forced to accept an unsatisfactory employee, and unionized employees are subject to discipline the same as all others. Regarding the burden of proof, the court indicated that the employee bears the ultimate burden of persuasion but may rely on a prima facie showing to shift to the employer a limited burden of producing evidence. In order to establish a prima facie case, an employee need not introduce direct evidence of unlawful motive such as anti-union statements, but instead, may rely upon factual matter which may revolve upon circumstantial evidence from all of the facts. If, however, the employer has stated a lawful reason for its decision and produces supporting facts, the prima facie case is rebutted. Therefore, the burden of persuasion remains on the employee, who must prove by a preponderance of evidence that the asserted lawful reason for discharge was not the real reason.

The Vermont Supreme Court, in *Kelly v. Day Care Center, Inc.*,¹⁶ made it clear that discharge of a public employee motivated solely by inadequacies of performance did not constitute an unfair labor practice. If this is the case, the employer's motive for discharge becomes a crucial issue when the firing is challenged by the employee. Because of the difficulty in proving illegal considerations, the court approved the practice of inferring unlawful motivation from attending circumstances. Among the circumstances which permit such an inference are the employer's knowledge of the employee's labor activity, evidence that it fostered a climate of coercion, and the suspicious timing of the discharge.

The issue of discharge has also been questioned in the light of agency shop clauses.¹⁷ In *Board of Education of School District v. Parks*,¹⁸ the Michigan Supreme Court considered the impact of an agency shop agreement upon a tenured teacher. In the agreement negotiated between the board of education and the teachers' union, teachers were required to pay a union service fee. If a teacher failed to pay this fee, the board of education was required to discharge the employee. The teacher plaintiff initially paid the fees under protest but, after a period of time, she refused further payment. At the request of the teachers' union, she was discharged by the board.

The court held that a union that improperly demands that an employee be discharged for failure to pay union service fees commits an unfair labor practice and that an employer that improperly discharges said employee likewise commits an unfair labor practice. However, in the instant case, the court held that the state's tenure act was inapplica-

15. 436 N.E.2d 380 (Mass. 1982).

16. 451 A.2d 1106 (Vt. 1982).

17. This clause generally provides that all employees represented by a union, whether union members or not, must pay a service fee to the union for services provided.

18. 335 N.W.2d 641 (Mich. 1983).

ble in that the Public Employment Relations Act permitted an employer to agree with a union to require, as a condition of employment, that all employees pay union service fees. Thus, no unfair labor practice was committed by either party since the discharge was pursuant to a properly negotiated agreement.

The key elements present in this series of cases appear to be the presence of anti-union animus and the burden of proof. These elements again flow to the next area under consideration.

Employment

*Alaska Community v. University of Alaska*¹⁹ clearly demonstrates the flow of elements addressed above. The Supreme Court of Alaska held that, with the rarest of exceptions, the discharge or lesser discipline of an employee for union activity will not be deemed an unfair labor practice absent proof of an anti-union animus. In this case, the court held that the teachers' union was required to demonstrate that a union negotiator was denied summer employment because of some anti-union motivation on the part of the university and, in the absence of such, no unfair labor practice was found. It was determined by the court that the failure to hire the negotiator was based upon the fact that more qualified applicants were available and ultimately, that a lack of student interest caused the class to be cancelled. The union thus failed to demonstrate the necessary anti-union animus as the basis for an unfair labor practice. The emerging pattern in the categories addressed suggests that it is relatively easy to allege unfair labor practices and/or grievances, but producing evidence sufficient to meet the courts' required burden of proof is much more difficult.

Failure to Abide by Collective Bargaining Agreement

With the exception of the category encompassing unilateral changes in wages or conditions of employment, no other category better illustrates the merging nature of grievances and unfair labor practices. In *Savage Public Schools v. Savage Education Association*,²⁰ the local board of education had refused to submit a grievance over non-renewal procedures to arbitration as was required by the collective bargaining agreement entered into between the school board and the teachers' association. The teachers' association appealed the matter to the Board of Personnel Appeals which held that, under the collective bargaining agreement, the school board's refusal to permit arbitration was not only a refusal to bargain in good faith but an unfair labor practice as well. This was based upon the fact that a breach of the agreement constituted an unfair labor practice.

19. 669 P.2d 1299 (Alaska 1983).

20. 647 P.2d 833 (Mont. 1982).

On appeal, however, the state district court reversed the Board of Personnel Appeals and held that the school district had the sole discretion to remove non-tenured teachers and, therefore, the grievance relative to their non-renewal could not be submitted to arbitration. The hiring and retention of employees was held to be a managerial prerogative that was an improper subject of the bargaining agreement. But the Supreme Court of Montana reversed the district court. Since the collective bargaining agreement only referred to a grievance relating to the procedural steps employed in non-renewal and not the substantive grounds, the court felt that the statutorily reserved management rights of the school district were not affected.

Another issue frequently raised in this area is the failure to follow an arbiter's award. In *Board of Trustees v. Keene State College*,²¹ the Supreme Court of New Hampshire held that a breach of a collective bargaining agreement is an unfair labor practice and that, when arbitration is entered into by the parties to a labor dispute pursuant to that agreement, the failure by one of the parties to abide by the resulting arbitration award is a breach of the agreement and, thus, an unfair labor practice.

It is abundantly clear that duly authorized collective bargaining agreements will be enforced by the courts. As opposed to previous categories, the burden here appears squarely placed upon employers to demonstrate why they have failed to abide by their own agreements. This burden continues through the next area.

Refusal to Bargain

While many of the cases in this category deal with the issue of bargaining in good faith, there are several other issues unrelated to good faith that should be addressed, since they provide insight into the direction the courts are taking.

In *re White Mountain Regional School Board*,²² disclosed several of these issues. In that case, the school district entered into a collective bargaining agreement with White Mountain's Education Association which was the exclusive bargaining agent not only for teachers but for cooks and related workers as well. The agreement provided that the employees covered were to be employed for up to eight hours a day.

Pursuant to this, the district entered into individual employment contracts with the cooks setting forth the exact number of hours to be worked by each. Later, due to partial loss of funding, the district recognized that it would have to reduce the number of hours for cooks. After meeting with the individuals, the district notified four of them that their hours would be reduced from the levels set forth in their individual contracts. This caused the teachers' association to file an unfair labor practice complaint with the state Public Employee Labor

21. 493 A.2d 1121 (N.H. 1985).

22. 485 A.2d 1042 (N.H. 1984).

Relations Board alleging, among other things, several unfair labor practices for refusal to negotiate.

On appeal, the board of education asserted four defenses against the labor relations board's findings of unfair labor practices, which included the assertion that the district retained the right to relieve employees of duties because of lack of work or a reduction in funding. To this, the Supreme Court of New Hampshire replied that the district did not have to bind itself unconditionally to employ the cooks for a certain number of hours but, when it chose to do so in individual contracts, it was bound and lack of funding or work would not relieve it from that obligation. To change the contracts without bargaining was tantamount to a refusal to negotiate or bargain collectively, which was an unfair labor practice.

In a somewhat similar case, *Minersville Area School v. Commonwealth of Pennsylvania Labor Relations*,²³ the Commonwealth Court of Pennsylvania held that a school district failed to bargain in good faith over the issue of whether the district's cafeteria services should be performed by an independent contractor. When the district entered into negotiations with the employees for a new agreement to replace the one about to expire, it could not contract out cafeteria services after having met only one time with the workers. The court held that certain steps must be followed if the district was to satisfy its obligation to bargain with the employees. Did the district seek concessions from its cafeteria employees? Did the district then seek bids from private contractors if the employees refused to make concessions? Did it then go back to the employees after having received bids and continue negotiations on concessions from the employees? In this case, the court concluded that the district had not bargained on the issue of utilization of a private contractor and, thus, an unfair labor practice had been committed.

The distinction between refusal to bargain on items affecting only teachers and those affecting the school community as a whole is illustrated in *Union County School Corporation v. Indiana Education*.²⁴ Here, the court concluded, in upholding the state labor relations board's finding, that scheduling of makeup days was an item of mandatory discussion which could not be unilaterally adopted. Thus, the refusal to discuss this was an unfair labor practice based upon a refusal to bargain. The court rejected a similar finding relative to the school closing plan. The court felt that a school closing plan directly affects everyone in the school community by determining attendance and that, often, exigent circumstances require the immediate need to adopt a plan in order to be prepared. Based upon this, the school board should not be required to delay implementation of such a plan simply to discuss it with one particular interest group, the teachers' association.

Finally, no unfair labor practice based upon a refusal to bargain was found by the court in *Alaska Community v. University of Alaska*.²⁵

23. 475 A.2d 962 (Pa. Commw. Ct. 1984).

24. 471 N.E.2d 1191 (Ind. App. Ct. 1984).

25. 669 P.2d 1299 (Alaska 1983).

when the employer refused to sign a tentative agreement. One of the ground rules agreed to between the union and the university's representative was that "any proposal, once signed by all parties, shall cease to be an object of further negotiation, and is subject only to ratification of the entire agreement by the union membership and the board of regents." Thereafter, a tentative agreement between the negotiators was reached and initialed but the university's board of regents refused to ratify the agreement until the new incoming university president had an opportunity to review it and make recommendations. Upon his review, he recommended that it not be ratified and it was rejected by the board.

The union alleged that this was an unfair labor practice. The court held that it was permissible for the board to refuse to ratify the tentative agreement so long as this refusal did not result from the board's intent to string out negotiations or avoid reaching agreement. Here, the board simply was exercising its option to disapprove a tentative agreement in accordance with the agreed upon ground rule.

As seen in earlier categories, courts require strict compliance with the bargaining agreement. Here, they also require that bargaining itself take place if the employer wishes to change the agreement. This requirement has also been extended to prohibit unilateral changes by the employer.

Unilateral Changes in Wages or Conditions of Employment

In this category, two distinct doctrines emerge: the alter ego theory and maintenance of the status quo. In defining status quo, the court in *Indiana Education Employment v. Millcreek Teachers*,²⁶ held that the legal definition as related to labor relations was "the existing state of things at any given date ... the last actual, peaceful, uncontested status which preceded the pending controversy."

In this particular case, the existing agreement between the teachers and the board of education expired during negotiations and the board continued to pay the teachers based upon their previous years' salary without the increases, or increments, based upon longevity and experience, that had been built into the previous years' negotiated agreement. The court held that the refusal to grant the increment pending agreement on the new contract was a unilateral change in existing conditions of employment that resulted in an unfair labor practice.

Further, in order to maintain the status quo of the prior contract, the board was required to maintain the salary schedule, including increments which were a part of that schedule. The board's refusal amounted to a penalty on the employees and their bargaining agent for exercising their rights under the previous agreement. This court felt that mainte-

26. 456 N.E.2d 709 (Ind. 1983).

nance of the status quo after expiration of the previous contract and during negotiations for a new contract is important since it serves to continue the balance in the bargaining power of the parties and provides the necessary flexibility to reach agreement.

A contrary holding was expressed however, in *Fairview School District v. Unemployment Compensation Board of Review*.²⁷ Under similar circumstances as in *Millcreek Teachers*, the Pennsylvania Supreme Court held that the school district's refusal to step up salaries did not constitute a disruption of the status quo. Indeed, to require the salary increments contained in the expired contract would change the existing relationship; the underlying rationale for the status quo requirement is to allow the parties to continue working and negotiating on an equal basis in good faith. Alteration of any condition of employment could be used by one party as leverage in the ongoing negotiation process to the disadvantage of the other party.

Insurance benefits have also been addressed by several courts in a similar manner. When a prior negotiated agreement expires during negotiations for a new agreement, insurance benefits cannot unilaterally be discontinued by an employer.²⁸ Further, while an expired agreement may provide that a school district has the authority to change insurance carriers so long as the benefits provided are at least equal to the old carriers, it has been held that this ability ceases when the prior agreement expires and that the carrier must remain the same in order to continue the status quo. Even the smallest changes have been considered a disruption of the status quo.²⁹

Once negotiations for the new collective bargaining agreement have reached impasse, however, the employer may make unilateral changes to implement the last offer that the teachers have rejected. In fact, the employer need not implement changes exactly identical with its last offer so long as the unilateral adoptions are reasonably comprehended within the preimpasse proposals.³⁰

The Michigan Court of Appeals, in *West Ottawa Education Association v. West Ottawa Public Schools*,³¹ dealt with the alter ego test advanced by the education association. In 1980, the board of education determined to discontinue a class in Dutch dance. The instructor of the dance program was a part of the teacher association's bargaining unit. The dance class, however, was offered the next year by the community education program and was taught by the same instructor at the same salary. The program was run by a consortium composed of three school districts, one of which was West Ottawa. The teachers' association

27. 454 A.2d 517 (Pa. 1982).

28. *Smith County Educ. Ass'n v. Anderson*, 676 S.W. 2d 328 (Tenn. 1984).

29. *Grandinetti v. Commonwealth Unemployment Compensation Bd.*, 486 A.2d 1040 (Pa. Commw. 1985); *Chichester School Dist. v. Unemployment Compensation Bd. of Rev.*, 415 A.2d 997 (Pa. Commw. 1980).

30. *Public Employment v. Modesto City Schools*, 186 Cal. Rptr. 634, 136 Cal. App. 3d 902 (1982).

31. 337 N.W.2d 533 (Mich. Ct. App. 1983).

alleged that the board had sub-contracted the teaching of Dutch dance without first bargaining with the association and that this amounted to an unfair labor practice. They further claimed that the consortium was the alter ego of West Ottawa. In determining whether the consortium was an alter ego, the court considered such factors as whether the two enterprises had substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. The focus of this test was on any continuing disguised attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations. The court also noted that this test was closely related to the "single employer" doctrine employed by the National Labor Relations Board. In the instant case, the court held that the two entities were not alter egos of one another.

While the courts appear divided on the question of maintenance of the status quo, a clear test for determining an alter ego organization has been developed. Tests such as that, however, are more the exception than the rule.

Non-Membership, Rival Union, and Assistance

As was noted in a previous category, it is an unfair labor practice for a union to improperly demand that an employee be discharged for failure to pay agency service fees; also, it is unfair for an employer to discharge the employee for such failure. But in those states that permit agency service fees, such a demand or discharge is not an unfair labor practice.³² Further, grievances and unfair labor practices are frequently alleged in the area of a teacher association's failure to adequately represent the interests of a non-member. While a wide range of reasonableness is allowed bargaining representatives in serving the units they represent, they are always held to complete good faith and honesty of purpose in the exercise of this discretion.³³

The courts have also addressed activity by boards and teacher associations against rival unions. In *School Board of Dade County v. Dade Teacher's Association*,³⁴ the court held that the school board and the teacher's union committed an unfair labor practice against a rival union by removing the rival's materials from all-purpose school bulletin boards and by prohibiting members of the rival from soliciting memberships in the school parking lots. The board based its parking lot policy upon extraordinary circumstances related to increased criminal activity on school campuses, perpetrated by outsiders entering the school property. The court held that the need for security did not justify the no access rule if another rule which was less restrictive of the rival employees' rights would have accomplished the same goal.

32. Board of Educ. of School Dist. v. Parks, 335 N.W.2d 641 (Mich. 1983).

33. Trinque v. Mount Wachusett Community College Faculty Ass'n, 437 N.E.2d 564 (Mass. Ct. App. 1982).

34. 421 So. 2d 645 (Fla. Dist. Ct. App. 1982).

The board's defense of the denial of bulletin board privileges was based upon the belief that this would endanger harmony and cause friction among employees. The court felt that both state law and the first amendment prohibited such a rationale. Thus, both policies were held to be unfair labor practices.

The assistance to a union is an area that somewhat parallels that of rival unions. The Washington Supreme Court had the opportunity to address this category by deciding whether or not contributions or gifts to a union constituted an unfair labor practice. In that case, the school district had agreed in a collective bargaining contract that certain employees were allowed release time to be used at the behest of the education association.³⁵ The state auditor alleged that this contributed support to the employee organization and thus violated the state's labor law relating to unfair labor practices. However, the court felt that, in this context, contributed support to an employee organization was analogous to the granting of something without an obligation to do so.

Throughout all of the categories discussed, we see the dominance of NLRA philosophy and policy in public sector labor relations. While many state laws are not closely modeled upon the NLRA, the cases discussed in this article relied upon the federal act for guidance and interpretation of the issues presented. It is true that some jurisdictional differences exist, but generally speaking, the courts are uniform in interpretations that are consistent with the NLRA.

The Future

As might be expected, when the majority of the nation's public educational employees were granted various forms of unionization and collective bargaining rights in the 1960s and '70s, a period of turmoil resulted. This has frequently been the case when once excluded members of a group are suddenly brought into the fold. The expansion of civil rights to various minorities is an example of the creation of massive judicial activity where little or none once existed.

After more than ten years of judicial intervention and activity in public education labor relations, the dust appears to be settling as both employers and employees become more aware not only of their rights, but of their responsibilities as well. More importantly, it appears from the recent case activity in the area of unfair labor practices and grievances that the adversarial nature of these labor relations may be diminishing as the parties seek judicial guidance on genuine issues of concern.

As the courts and various state labor relations boards continue to define rights and responsibilities and to develop workable tests to implement the same, labor relations should continue to improve. Adolescence is exciting and new to the youngster who is growing and experiencing the zest of life; however, as the youngster matures into the

35. *State ex rel. Graham v. Northshore School Dist.*, 662 P.2d 38 (Wash. 1983).

adult, the knowledge of the responsibilities and limits placed upon the adult by society restricts conduct to limits that are acceptable. It appears from the cases concerning unfair labor practices and grievances that labor relations in public education has grown from adolescence and is emerging into a mature adult.

A New Generation of Tenure Problems: Legal Issues and Institutional Responses

Barbara A. Lee

Academic tenure has been the subject of intense debate in America for decades, a debate which crystallized in the early twentieth century, when the American Association of University Professors (AAUP) was formed,¹ and which has continued unabated to the present. The debate has taken place in the general and scholarly press and literature, in academic and legislative fora and, most especially, in the state and federal courts.

The intensity of the debate is understandable when one considers the issues at stake. The proponents of tenure cite the need to protect faculty from incursions upon their academic freedom by legislators, trustees, and administrators; the role of tenure in increasing the stability of the faculty workforce; and the need to offset low salaries by enhanced economic security.² Opponents of the tenure system point to limited institutional flexibility once a sizable proportion of its faculty are tenured, the diminished accountability of tenured faculty, and the difficulty of terminating the employment of tenured faculty.³ Litigation over tenure issues has focused primarily on the extent of the procedural protections afforded faculty⁴ or whether the tenure decision was properly made.⁵

It has been nearly fifteen years since the Supreme Court issued its seminal opinions in *Board of Regents v. Roth* and *Perry v. Sindermann*.⁶ Trial and appellate courts, both state and federal, have addressed a multitude of tenure-related disputes; issues such as the limits of de facto tenure,⁷ the incorporation of AAUP standards into employment con-

1. R. Hofstadter & W. Metzger, *The Development of Academic Freedom in the United States* (1955).

2. Commission on Academic Tenure, *Faculty Tenure* 16 (1973).

3. *Id.* at 14.

4. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Perry v. Sindermann*, 408 U.S. 593 (1972). See also *Toney v. Reagan*, 467 F.2d 953 (9th Cir. 1972).

5. See, e.g., Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J. L. & Educ. 279 (1977).

6. See cases cited *supra* note 4.

7. *Id.* See also *Zimmerman v. Spencer*, 485 F.2d 176 (5th Cir. 1973), *Sawyer v. Mercer*, 594 S.W.2d 696 (Tenn. 1980).

tracts,⁸ and the dismissal of tenured faculty in times of financial exigency⁹ have been reasonably well settled by the judiciary.

A "new generation" of tenure issues has arisen, however, to occupy the attention of faculty, administrators, and the courts. These new legal issues parallel the changing fortunes of higher education; in the years since *Roth* and *Sindermann*, higher education has faced enrollment declines,¹⁰ demands for greater accountability by legislators, students, and the general public,¹¹ and a growing emphasis on quality which echoes the somewhat earlier "excellence" movement in elementary and secondary education.¹² Not surprisingly, therefore, the tenure issues addressed recently by the courts have shifted from a delineation of the parameters of faculty tenure rights to the limitations of those rights.

This chapter will address three recent developments concerning faculty tenure: heightened standards for promotion and tenure; periodic review of tenured faculty; and the degree to which tenure conflicts with internal or external demands for faculty accountability. It will examine institutional responses to the "new" set of pressures on higher education, the ensuing litigation by faculty over those responses, and the implications for redefined faculty and administrative rights and responsibilities.

Heightened Promotion and Tenure Standards

The juxtaposition of several factors has resulted, at many institutions of higher education, in heightened performance standards for faculty. Because of the nature of tenure, and the arguments against reviewing faculty after tenure has been awarded,¹³ academic administrators have realized that the reappointment, tenure, and promotion processes are often the only realistic opportunity to assess individual faculty performance. Furthermore, the depressed faculty job market has resulted, for many disciplines, in a pool of talented applicants with whom a department can replace a nontenured faculty member whose performance has not satisfied the department's or the institution's expectations. Under pressure from the public or other sources to improve the quality of the education they provide, some colleges and universities have responded

8. *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969). See also *The Role of Academic Freedom in Defining the Faculty Employment Contract*, 31 Case W. Res. L. Rev. 608 (1981).

9. See, e.g., Olswang & Fantel, *Tenure and Periodic Performance Review: Compatible Legal and Administrative Principles*, 7 J. C. & U. L. 1 (1980-81).

10. Carnegie Commission on Policy Studies in Higher Education, *Three Thousand Futures* (1980).

11. S. Olswang & B. Lee, *Faculty Freedoms and Institutional Accountability: Interactions and Conflicts* (1984).

12. See, e.g., National Institute of Education Study Group on the Conditions of Excellence in American Higher Education, *Involvement in Learning: Realizing the Potential of American Higher Education* (1984).

13. See *infra* text accompanying notes 52-70.

by demanding more and higher quality publications, terminal degrees, or other objective and subjective measures of faculty performance.¹⁴

The responses of institutions to these pressures have resulted in higher performance expectations being applied to new faculty, standards with which incumbents may not have been expected to comply. The resulting "double standard" for junior and senior faculty results in morale problems for both,¹⁵ and in litigation for the college.

Institutions have "raised standards" in one of two ways. Some have begun to insist that faculty hold a terminal degree before being awarded tenure, even if no terminal degree was required for tenure or promotion at the time of hiring. Others have demanded that faculty demonstrate their commitment to research and scholarship by producing a certain number and/or quality of scholarly publications. Challenges to these heightened standards have been brought under several legal theories. In general, plaintiffs have argued either that the new requirements deny them contractual or due process rights, or that the new requirements are a pretext for employment discrimination.¹⁶

The Terminal Degree Requirement

Whether the faculty member has used a contractual argument or one grounded upon employment discrimination, the burden of the argument is that the institution has applied more stringent requirements to new faculty than it did in the past, and that the faculty member has a legally protected right to be judged under the same standards that were applied to faculty tenured at an earlier time. At public institutions, faculty have argued that they have a property right in the earlier performance standards, especially if the institution has toughened the standards between the time that the faculty member was hired and the time that he or she was evaluated for tenure.

In *Fairchild v. Vermont State Colleges*,¹⁷ Johnson State College denied tenure to an assistant professor of physical education because, although warned several times that the lack of a terminal degree "threatened her prospects for tenure,"¹⁸ she had not completed it. Despite administration testimony that the plaintiff was "an outstanding

14. R. Birnbaum, *State Colleges: An Unsettled Quality, in Contexts for Learning: The Major Sectors of American Higher Education* (1985).

15. H. Bowen & J. Schuster, *American Professors: A National Resource Imperiled* (1985).

16. United States policy on affirmative action has increased the numbers of women and minority faculty to some degree, but most of these individuals are as yet untenured. Institutions of higher education are applying heightened performance and educational requirements to members of underrepresented classes, whose access to graduate education and to networks of the scholars who influence publication has traditionally been limited, either by law or by practice. See, e.g., LaNoue, *Judicial Responses to Academic Salary Discrimination* (1982).

17. 449 A.2d 932 (Vt. 1982). This claim arose under a collective bargaining contract. The plaintiff, although female, did not allege gender discrimination under state or federal laws.

18. *Id.* at 933.

coach and a superior teacher," the college had determined that "even unusually high quality teaching or coaching were not adequate substitutes for a terminal degree."¹⁹

The plaintiff made several arguments in favor of tenure. First, the faculty handbook stated that the requirements for tenure were "acquisition of a terminal degree in [the] major teaching field or 'significant professional, artistic, or scholarly accomplishment.'" The plaintiff argued that she had met the tenure criterion under the "significant accomplishment" prong of the handbook requirement. Furthermore, she argued, a male physical education professor had been awarded tenure without having an earned terminal degree.²⁰

The court accepted administrative testimony that the two faculty members were not similar, for the male had "more accomplishments," and thus met the "significant accomplishment" criterion, while the plaintiff had not.²¹ In addressing the legality of heightened performance standards, the court noted that the college's interpretation of its tenure criteria was rational because it ensured that "candidates for tenure demonstrate various accomplishments and abilities in addition to those displayed by their performance on the job."²² The court added that, although the decision was subjective, it did not appear to have been made in an arbitrary or discriminatory manner.²³ The opinion reveals no attempt by the court to require the administration to demonstrate the relationship between a terminal degree and the performance of the plaintiff's job: teaching physical education courses and coaching collegiate sports.²⁴

In *Wells v. Doland*,²⁵ a not-uncommon change in academic leadership led to the denial of tenure to an assistant professor of criminal justice. A new dean of the College of Liberal Arts and a new department head arrived at McNeese State University in Louisiana, and determined that all faculty desiring tenure would be required to hold a terminal degree. After denying tenure to the plaintiff, the department replaced him with an individual who held a doctorate. The plaintiff, using an equal protection theory, argued that the new policy denied his due process rights; however, the court rules that the new "tenure regulations promote a legitimate [state] interest in furthering permanency in the teaching force of universities and in insuring a more competent teaching staff."²⁶

19. *Id.* at 934.

20. *Id.* at 933.

21. *Id.* at 935.

22. *Id.* at 934.

23. *Id.*

24. Such a demonstration is frequently required in discrimination cases, especially when a plaintiff alleges that the requirement impacts more heavily on protected class members than on majority individuals. See, e.g., Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L. Rev. 45 (1979-80). See also Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).

25. 711 F.2d 670 (5th Cir. 1983).

26. *Id.* at 675.

Difficult legal issues have arisen when the performance standards in existence at the time a faculty member is hired shift before the time he or she is evaluated for tenure. Although plaintiffs have raised contractual and due process issues regarding the fairness of "changing the rules" between the hiring and tenure decision, courts have been uniformly unsympathetic to these claims. For example, the Vermont Supreme Court ruled that, if an institution gave the faculty member notice of the new standards, and a reasonable time with which to comply with those standards, then their application to him was not arbitrary, nor a denial of his due process rights.

The faculty member had been hired by Lyndon State College in 1974 as an assistant professor of meteorology, and was told that a doctorate was not necessary for tenure.²⁷ Two years later, however, the state college system entered a collective bargaining agreement with the statewide faculty union that required a terminal degree for the granting of tenure.²⁸ Early the next year, the college's dean advised the plaintiff that "although his chances for obtaining tenure were good, the safest course would be to acquire a terminal degree."²⁹ This conversation, the court ruled, put the plaintiff on notice that the degree was required. Although the plaintiff argued that his tenure denial in 1979 was a surprise, and that he had been misled by the college administration, the court agreed with the state labor board's conclusion that the plaintiff had sufficient notice, for he "had over three years to comply with the new criteria; certainly sufficient time, especially since he had completed the bulk of his work leading to a doctorate degree."³⁰ In a similar case before the same court one year later, the court affirmed its position in the two earlier cases, ruling that the decision of the president of Johnson State College to deny tenure to an assistant professor of political science for failure to meet the terminal degree requirement was not arbitrary because this plaintiff had been warned *four* years earlier of the need to complete his doctoral degree.³¹

Plaintiffs have been no more successful challenging terminal degree requirements under civil rights theories. In *Campbell v. Ramsey*,³² the chair of the mathematics department at the University of Arkansas decided not to renew the contract of a female faculty member because she lacked a doctoral degree. The plaintiff argued that the nonrenewal was discriminatory because women were underrepresented among holders of doctorates in mathematics, but the court ruled that, despite the disparate impact on women of requiring a doctorate, "the requirement of a Ph.D., a recognized credential in the academic community, was a legitimate and nondiscriminatory reason for not renewing plaintiff's

27. *D'Aleo v. Vermont State Colleges*, 450 A.2d 1127 (Vt. 1982).

28. *Id.* This is the same language that was disputed in *Fairchild*, 449 A.2d at 932.

29. *Id.*

30. *Id.*

31. *Lewandoski v. Vermont State Colleges*, 457 A.2d 1384 (Vt. 1983).

32. 22 Fair Empl. Prac. Cas. 83 (E.D. Ark. 1980).

employment."³³ Furthermore, the court recognized the importance of the doctoral degree requirement to institutional prestige, saying that universities often "raise [their] academic status" by increasing the number of faculty with doctorates, that accrediting agencies monitor institutional quality in part by the number of faculty holding doctoral degrees, and that "the department gets greater flexibility in faculty assignments by hiring a teacher with a doctorate."³⁴

The plaintiff in *Scott v. University of Delaware*³⁵ met with a similar lack of success when he argued that requiring a terminal degree for either hiring or tenure had a disproportionately negative impact upon blacks. In this class action litigation, spearheaded by a sociology professor denied renewal, the plaintiff argued that the duties of most faculty were limited to undergraduate teaching, and that advanced graduate work was not necessary to the competent performance of such duties. The court disagreed, however, ruling that

while the "Ph.D. or its equivalent" requirement probably has a disparate impact upon blacks, I conclude (1) that this disparate impact is justified by the legitimate interest of the University in hiring and advancing persons who are likely to be successful in adding to the fund of knowledge in their chosen disciplines and effective in the teaching of graduate students in those disciplines.³⁶

In both this case and *Campbell*, the court found the requirement of a terminal degree to be not only reasonable but of such significance to the mission of the institution that it overcame legitimate arguments that the requirement disproportionately excluded minorities and women.

The surest institutional defense to a legal challenge of heightened degree requirements appears to be the need to maintain or upgrade the quality of the institution's academic program. In addition to the cases described above, Pennsylvania state courts approved the implementation of a terminal degree requirement for full-time employment in two cases in which part-time faculty had sought the full-time positions, but were found unqualified. In *Kovich v. Mansfield State College*, the court ruled that "educational institutions may impose certain requirements in order to maintain their accreditation."³⁷ In an earlier case, the plaintiff had challenged the imposition by only one department in the college, of a doctoral degree requirement, asserting that the lack of uniformity of degree requirements resulted in an arbitrary and illegal policy. In this case against Slippery Rock State College, the court asserted:

33. *Id.* at 84.

34. *Id.* at 86.

35. 455 F. Supp. 1102 (D. Del. 1978), *aff'd*, 601 F.2d 76 (3d Cir. 1979), *cert. denied*, 444 U.S. 931 (1980). Scott's denial was for lack of publication and poor teaching; he did hold a Ph.D., but included the terminal degree issue in his class action litigation. See text accompanying notes 46-48, *infra*.

36. 455 F. Supp. 1102 at 1126.

37. 478 A.2d 950, 952 (Pa. Commw. 1984).

Reasonable minds may differ as to whether the Department of English ... should have a policy requiring an otherwise qualified teacher to have a doctorate as a condition to full-time employment, when other departments in the College do not have such a requirement. Nevertheless, establishment of such policy is the prerogative of the Board of State College and University Directors.³⁸

The courts did not appear to have reviewed the criteria against which the college had determined the requirement to be "reasonable"; they appear to have accepted the colleges' claims at face value.

Publication Requirements

A more widespread mechanism for "raising standards" has been the demand for more and better quality publications as a requirement for tenure (and, at some institutions, for renewal). Like the terminal degree requirement, many institutions have insisted that recently hired faculty publish at a higher rate, and in better quality journals, than faculty hired in earlier years. Such standards have led to charges by aggrieved faculty of denials of equal protection, due process, and, in a few cases, of denials of civil rights.

The challenges to heightened publication requirements have generally met the same fate as faculty challenges to a terminal degree requirement. Courts have ruled that, as long as the new requirement was applied uniformly to all faculty who were evaluated for renewal, promotion, or tenure in a particular year, the college or university had the right to demand higher performance levels from its faculty. Furthermore, the courts have left it to the colleges (and frequently to the administration rather than the teaching faculty) to determine the level of quality demanded, whether the faculty member's publications met that standard, and whether the number of publications was sufficient to support a positive tenure decision.³⁹

For example, in *Clark v. Whiting*, an associate professor of biology at North Carolina Central University claimed that his equal protection and due process rights were violated when the institution repeatedly refused to grant his requests for promotion to full professor.⁴⁰ The basis for the promotion denials was the department's (and the administration's) decision that the plaintiff had "failed to meet the publication requirements requisite to attaining the rank of full professor."⁴¹ In

38. *Slippery Rock State College v. Pennsylvania Human Rights Comm'n*, 314 A.2d 344, 347 (Pa. Commw. 1974).

39. Judicial deference to academic judgments, whether of individual faculty merit or of the criteria for evaluating such merit, has been analyzed in Lee, *Balancing Confidentiality and Disclosure in Faculty Peer Review*, 9 J. C. & U. L. 279 (1982-83). See also Lee, *Federal Court Involvement in Academic Decision-Making: Impact on Peer Review*, 56 J. Higher Educ. 38 (1985).

40. 607 F.2d 634 (4th Cir. 1979).

41. *Id.* at 637.

response to the plaintiff's contention that his three "scholarly publications" (a self-published laboratory manual, his Ph.D. thesis, and an article accepted for publication but not yet in print) were of sufficient quality and quantity to support a promotion to full professor, the court replied that such determinations were up to the academics, not to the courts, and held further that "the determination of such matters by the appropriate university authorities is not reviewable in federal court on any ground other than racial or sex discrimination or a first amendment violation."⁴² The court did not explicitly address the issue of the fairness of heightened publication requirements, but implicitly affirmed the institution's right to require greater publication activity by refusing to review the reasonableness of the requirement or the accuracy of the evaluative judgments by the plaintiff's peers.

The Supreme Court of Vermont was similarly unsympathetic to a claim by a professor denied tenure at Lyndon State College that the college failed to accord sufficient importance to his single published article in its decision that, in view of his lack of a terminal degree, he had not demonstrated "significant professional, artistic or scholarly accomplishment."⁴³ Furthermore, the plaintiff argued, the college did not have the right to distinguish qualitatively between his article, published in the proceedings of the 1977 Lyndon State College Storm Conference, and three publications of a fellow faculty member (who had been granted tenure although lacking a terminal degree) in journals recognized by the American Meteorological Society. The court disagreed, saying that

the decision [that greater weight is to be accorded writings which are published in recognized professional journals] is within the broad discretion of the Colleges ... is not arbitrary or discriminatory ... [and] is rationally related to the goals of higher education, whatever this Court may think of its underlying wisdom.⁴⁴

Again, the court did not address explicitly the issue of whether heightened publication requirements were *per se* unfair, but implicitly recognized the college's right to require reasonable performance levels, in terms of both quality and quantity of publications, from faculty desiring tenured status.

In several cases, plaintiffs have alleged that the application of tougher publication requirements constituted sex or race discrimination. Again, the courts have disagreed. In *Lieberman v. Gant*,⁴⁵ a female English professor charged that male professors had been tenured in the past with publication records substantially weaker than hers. Although external reviewers had criticized the quality of Dr. Lieberman's publications, she had challenged the qualifications of the reviewers, and had

42. *Id.* at 641.

43. *D'Alao v. Vermont State Colleges*, at 1130.

44. *Id.*

45. 630 F.2d 60 (2d Cir. 1980).

alleged that the communication from the department chair soliciting their views had prejudiced the reviewers against her. The Court of Appeals for the Second Circuit affirmed a trial court ruling that the department had applied fair and rational standards to the evaluation of her qualifications for tenure, and no discrimination was found.

Another federal court reached a similar conclusion in *Scott v. University of Delaware*.⁴⁶ The Sociology Department had recommended against reappointment for Dr. Scott because he had not published at all during his first three-year contract with the university. Ironically, it was the department's first attempt to apply heightened standards in the reappointment process, and they resulted in the nonrenewal of a protected class member. Nevertheless, the trial court ruled, and the Court of Appeals for the Third Circuit agreed, that the department had applied reasonable and fair standards to the nonrenewal decision, and that the conduct of the faculty "at a time when a change in departmental philosophy was bringing very heavy emphasis to the area of scholarship" was fair and nondiscriminatory.⁴⁷ Minority plaintiffs in other cases in which an insufficient publication record has been cited as the basis of the tenure denial have been similarly unsuccessful in alleging that discrimination was the basis for the negative decision.⁴⁸

It appears that the argument of protected class members that heightened publication standards are discriminatory when applied to minority candidates for tenure in recent years, after more lax standards had been applied to white males, has been virtually eliminated because of the consistency with which the courts have ruled in colleges' favor. The Court of Appeals for the First Circuit summed up the judicial approach in these cases: the plaintiff "must show that he was subjected to a different standard because of his race or national origin" (or sex or religion). The court concluded that heightened performance standards are "a result of increased competition for tenure positions — variously described as 'the new professional situation' the college[s] found [themselves] facing ... and 'the golden moment for strengthening the faculty.'"⁴⁹

While the foregoing analysis of cases demonstrates the extent to which the judiciary will defer to the qualitative judgments of academics as to the appropriate performance standards for faculty, it is significant in other ways as well. Although the tenure criteria in the Vermont State Colleges cases were negotiated with the faculty union and incorporated in the collective bargaining agreement,⁵⁰ other cases demonstrated that

46. *Scott v. University of Delaware*, at 931.

47. *Id.* at 1122.

48. See, e.g., *Manning v. Trustees of Tufts College*, 613 F.2d 1290 (1st Cir. 1980). See also *Casler v. University of Maryland*, 430 F. Supp. 602 (D. Md. 1977).

49. *Banerjee v. Board of Trustees of Smith College*, 495 F. Supp. 1148, 1161 (D. Mass. 1980), *aff'd*, 648 F.2d 61 (1st Cir.), *cert. denied*, 102 S. Ct. 671 (1981).

50. Incorporation of tenure criteria in a collective bargaining contract would, of course, mean that the administration would not be able to change the criteria unilaterally during the life of the contract.

either the academic department or the administration could unilaterally raise the performance standards and could also apply those new standards to faculty hired under the old rules.⁵¹

Post-Tenure Review: Legal and Ideological Challenges

Post-tenure review raises hackles among college faculty and their professional associations. The arguments against post-tenure review have been primarily ideological rather than legal. Faculty leaders of the American Association of University Professors (AAUP) have argued that such a practice creates a "permanent condition of probation," and that "any process that allows colleges to decide repeatedly whether a faculty member is competent to stay on is a variation of 'term tenure,' which is an oxymoron."⁵²

In response to the issue of post-tenure review, the AAUP has adopted a "Statement on the Evaluation of Tenured Faculty." The burden of the statement is:

The Association believes that periodic formal institutional evaluation of each postprobationary faculty member would bring scant benefit, would incur unacceptable costs, not only in money and time but also in a dampening of creativity and of collegial relationships, and would threaten academic freedom.... The association cautions particularly against allowing any general system of evaluation to be used as grounds for dismissal or other disciplinary sanctions. The imposition of such sanctions is governed by other established procedures, enunciated in the 1940 *Statement of Principles on Academic Freedom and Tenure* and the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, that provide the necessary safeguards of academic due process.⁵³

Although the AAUP statement stresses the importance of adhering to the "established procedures" for determining the fitness of faculty for continued employment and the due process protections required before a tenured faculty member is dismissed, the arguments against the issue of post-tenure review appear to be ideological, not legal.

Others disagree with the AAUP, however. Olswang and Fantel assert that

tenure ensures against the infringement of academic freedom, but it does not insulate faculty from fair assessments of their competence to perform appointed duties. Periodic reviews themselves do not violate

51. See, e.g., *Scott v. University of Delaware*, at 931. See also *Lieberman v. Gant*, 630 F.2d, at 60, *Wells v. Doland*, 711 F.2d, at 670.

52. Perry, *Formal Reviews for Tenured Professors: Useful Spur or Orwellian Mistake?* Chron. Higher Educ., Sept. 21, 1983 at 25, 27.

53. *Statement on Evaluation of Tenured Faculty*, 69 Academe 14a (1983).

the principles of academic freedom; they simply assess performance in order to provide information which may be used for a variety of purposes — the reviews merely provide a fair evaluation of a colleague's ability, or inability, to successfully complete assigned duties, based upon the standards for faculty established at the institution.⁵⁴

In assessing the legality of post-tenure review, it is necessary first to determine the actual protections afforded by tenure. Tenure is the set of procedural protections established, either by contract or by statute, to guarantee that faculty employment decisions will be made on the basis of the faculty member's performance rather than on the basis of his or her views or other matters unrelated to the quality of the faculty member as a teacher and scholar.⁵⁵ But tenure may be removed for certain reasons, usually incorporated into the contract or statute which conferred tenure rights; typical reasons supporting the removal of tenure are incompetence, moral turpitude, neglect of duty, and insubordination.⁵⁶ As long as the tenured faculty member is afforded due process in the determination of whether the reasons alleged to support a tenure removal are valid and the process determines that academic freedom rights have not been abridged, the faculty member's legal rights have not been violated. This principle is confirmed by the *1940 Statement on Academic Freedom and Tenure* of the AAUP, which states that tenure may be "terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies."⁵⁷ Thus, the policy statement of an opponent of post-tenure review acknowledges that tenure is not a lifetime guarantee of employment.

As noted above, the state and federal courts have confirmed the right of faculty and administrators to determine the standards and criteria for granting promotion and tenure, and have generally refused to review such determinations.⁵⁸ Similarly, institutions have the legal right to determine the criteria for termination of tenure, subject to applicable state laws or contracts in effect. As Olswang and Fantel note, even the AAUP has acknowledged that the definition of adequate cause for the removal of tenure in its *1958 Statement on Procedural Standards for Faculty Dismissal Proceedings* is an institutional prerogative.⁵⁹ Therefore, unless state law forbids it or the institution has explicitly agreed not to evaluate tenured faculty in a contract, either collectively nego-

54. Olswang & Fantel, *supra* note 9, at 26-7.

55. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). For a history of the development of academic freedom in the United States, see W. Metzger, *The American Concept of Academic Freedom in Formation* (1977).

56. Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J. C. & U. L. 419 (1983-4). See also Olswang & Fantel, *supra* note 9.

57. American Association of University Professors, *Academic Freedom and Tenure, 1940 Statement of Principles*, in AAUP Policy Documents and Reports (1977).

58. For a discussion of judicial review of promotion and tenure decisions, see Lee, *Federal Court Involvement*, *supra* note 39.

59. Olswang & Fantel, *supra* note 9 at 11.

tiated or otherwise, it would appear that post-tenure review is the legal prerogative of the institution's administration.⁶⁰

Despite the substantial judicial deference to academics as the appropriate group to set performance criteria and to evaluate their subordinates or peers against those criteria, a cautionary note is in order. The commentators and many academic administrators agree that faculty should be closely involved in any post-tenure review process, and that the subjective determinations of a faculty member's competence should be made by peers, not by administrators.⁶¹ While a strong faculty role may not be required from a strict legal perspective,⁶² courts have recognized in cases challenging negative promotion and tenure decisions that the "tenured faculty ... are in the best position to make these judgments."⁶³

The mechanics of post-tenure review are not unfamiliar to academe, for tenure protections require institutions to conduct a performance review of any tenured faculty member before the individual is separated from employment. Both the state and the federal courts have upheld terminations of tenured faculty when the reviews have complied with substantive fairness and the due process guarantees of the tenure contract or statute.⁶⁴ However, conducting post-tenure reviews of all faculty, whether or not they have been identified through other means as "problem" faculty, is viewed as a different matter because it changes the nature of the tenure guarantee from one of autonomy to a heightened accountability to maintain both one's scholarly or teaching qualifications and one's standard or level of performance.

A review of cases revealed no litigation concerning the legality of post-tenure review alone. In fact, most post-tenure reviews which have been litigated have occurred in conjunction with a "problem" faculty member who the institution then attempts to terminate "for cause."⁶⁵ In such cases, faculty generally challenge the procedures used,⁶⁶ claim first amendment violations⁶⁷, or both. And judicial review of such cases has been limited to the fairness of the procedures and the degree to which the

60. In some states, the public sector bargaining law would not permit the administration of a public college or university to negotiate away management's right to evaluate its employees, including faculty, because performance review is a management prerogative, *see, e.g., State v. Supervisory Employees*, 78 N.J. 54 (N.J. 1978).

61. *See, e.g., Olswang & Fantel, supra note 9. See also Perry, supra note 52.*

62. *See, e.g., Chung v. Park*, 514 F.2d 382 (3d Cir. 1975), where the Third Circuit stated that "the administration of the internal affairs of a college and especially the determination of professional competency is a matter peculiarly within the discretion of a college administration." *Id.* at 387.

63. *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1357 (W.D. Pa. 1977).

64. *See, e.g., Chung v. Park*, 514 F.2d 382. *See also Adamanian v. Jacobsen*, 523 F.2d 929 (9th Cir. 1975); *Lehmann v. Board of Trustees of Whitman College*, 576 F.2d 397 (Wash. 1978).

65. *Id.*

66. *See, e.g., Chung v. Park*, 514 F.2d 382.

67. *See, e.g., State ex rel. Richardson v. Board of Regents, Univ. of Nevada*, 269 P.2d 265 (Nev. 1954).

decision was based upon faculty performance issues rather than the faculty member's ideas or beliefs.⁶⁸

The absence of litigation concerning the legality of post-tenure review may indicate only that few institutions conduct such reviews, rather than suggesting that such litigation would be unlikely. It also may indicate that, where post-tenure review does occur, it has been developed with the cooperation of the faculty, and is essentially a faculty responsibility.⁶⁹ It is not unlikely, however, that the legality of post-tenure review will be challenged in the future as enrollments decline, demands for accountability increase, and the concept of updating professional credentials gains increased acceptance.⁷⁰

The Compatibility of Institutional Accountability and Tenure

Analyzing the legal status of post-tenure review suggests a broader issue: the relationship between a college or university's need to be accountable to its funding sources (especially in the public sector), and the rights of tenured faculty. Again, no case law precedent addresses this issue specifically, but the implications of heightened demands for accountability have particular importance for the concept of tenure.

Institutions are facing demands from state legislators, government agencies, professional associations, and the public at large to justify the way that resources are expended, the way that faculty spend their time, and the manner in which faculty interact with students. While some issues are mixed questions of ethics and law (such as personal relationships between faculty and students), others influence the employment relationship between faculty and the institution. These accountability demands shift the image of faculty as a "community of scholars" to a group of employees who owe a full day's work to the employer in exchange for a full day's pay.⁷¹

One issue of special importance to tenured faculty has been the attempts of institutions to regulate the amount of time a faculty member may spend on external activities. A majority of the research and doctoral-granting institutions in the United States have promulgated policies on faculty consulting; some specify a maximum number of days per week or month that a faculty member may devote to external activities,

68. See Lovain, *supra* note 56.

69. See, e.g., at the University of Delaware, the faculty senate developed a system of post-tenure review as a response to legislative discussions regarding the continued viability of tenure at state colleges and universities. See G. LaNoue & B. Lee, *Beyond the Published Opinion: The Consequences of Academic Discrimination Litigation* (forthcoming).

70. Recertification or upgrading of professional credentials is developing among the medical, allied health and legal professions. For example, several states require lawyers to attend professional training seminars annually as a condition of maintaining their license. See Olswang & Fantel, *supra* note 9, at 29.

71. See Olswang & Lee, *supra* note 11, at 23-4.

while others limit the amount of money a faculty member may earn from such activities.⁷² The assumptions behind such regulations are that

persons who engage in outside work may neglect their teaching duties, their students, or their institutional responsibilities. Faculty members have full-time jobs and, like executives, owe all of their time to the institution.

If an institution promulgates a faculty workload policy, or a policy which limits external activities in some way, violation of such a policy by a faculty member, whether tenured or untenured, may be grounds for termination for cause.⁷⁴ Just as the courts have found heightened performance standards to bear a rational relationship to the mission of an educational institution, so, too, have they found consulting policies to be lawful, and not violative of a public employee's due process rights.

Plaintiffs have no constitutional right to engage in the unlimited private practice of medicine while holding a public position of employment ... the income limiting agreements ... [are] rationally related to the espoused legitimate goals of fostering full-time devotion to teaching duties.⁷⁵

Private sector colleges and universities, relieved of constitutional due process requirements, need only incorporate such requirements into their institutional policies and enforce them as contracts.

Demands for regulation of faculty conduct also have occurred in relation to perceived conflicts of interest between faculty responsibilities as employees of an academic institution and relationships with external organizations which may be funding their research. For example, some research universities have developed policies which forbid faculty to accept grants from sponsors who attempt to control when or how the research results are published.⁷⁶ Others limit the right of faculty to serve on the board of directors or to hold a financial interest in organizations which fund the faculty member's research.⁷⁷ Although these issues have not been litigated extensively, the analogy from cases on heightened performance standards and the regulation of external activities would suggest that, if the institution could articulate the relationship between the policy and the quality of the education it provides, most courts would find the policy an acceptable exercise of administrative power.

72. Dillon & Bane, *Consulting and Conflict of Interest*, 61 Educ. Rec. 52 (1980).

73. H. Yaker, *Faculty Workload: Research, Theory, and Interpretation* (1984).

74. See, e.g., *Gross v. University of Tennessee*, 448 F. Supp. 245 (W.D. Tenn. 1978), *aff'd*, 620 F.2d 109 (6th Cir. 1980).

75. *Id.* at 248.

76. Olswang & Lee, *supra* note 11, at 46.

77. Bouton, *Academic Research and Big Business: A Delicate Balance*, New York Times (Magazine), Sept. 11, 1983, at 62-3.

Accountability demands limit the autonomy of tenured faculty in other ways which have combined ethical and legal implications. For example, the judicial interpretations of title VII's limitations on sexual harassment not only protect students from abuse, but provide an additional "cause" for the termination of a tenured faculty member.⁷⁸ Similarly, institutional responses to allegations of scientific misconduct (plagiarism, falsification of data, abuse of confidentiality, or violations of regulations governing funded research) may result in the discipline or discharge of tenured faculty members.⁷⁹ A faculty member's tenured status does not shield him or her from compliance with either legal or ethical requirements, but merely provides a series of protections for the faculty member which regulate the institution's investigation of the allegations and its determination of the sufficiency of grounds for discipline or discharge.⁸⁰

Summary

The foregoing analysis suggests that a combination of environmental factors (heightened accountability demands, reduced mobility for faculty, and limited growth or actual decline), when added to judicial deference to the "business judgments" of academics concerning performance requirements and evaluation,⁸¹ have limited the degree to which tenure can protect faculty from regulation by external as well as internal forces.

The analysis, therefore, suggests a response to the following criticism of tenure by a respected commission:

Some of the criticisms of tenure are valid, as knowledgeable and candid proponents of tenure have always admitted. No system involving the judgment of persons can ever be foolproof; tenure decisions have on occasion been wrong and will continue to be. People change as they grow older; the powers and energies of some will decline, and some will decide to coast and take it easy. Institutions wishing to upgrade themselves have in fact found their efforts impeded by the presence of certain faculty members, who were perhaps competent enough by the earlier standards but mediocre by the new.⁸²

78. 42 U.S.C. § 2000(e) (1972). The EEOC Guidelines concerning sexual harassment are published at 29 C.F.R. 1604.11.

79. Olswang & Lee, *Scientific Misconduct: Institutional Procedures and Due Process Considerations*, 11 J. C. & U. L. 51 (1984).

80. *Id.*

81. Judicial deference to the decisions of administrators concerning policies which further the institution's mission is similar to the judicially-created "business judgment" rule, where "courts will not review the correctness of management's bona fide judgment." *Whittlesey v. Union Carbide*, 567 F. Supp. 1320 (S.D.N.Y. 1983), *aff'd on other grounds*, 742 F.2d 724 (2d Cir. 1984).

82. Commission on Academic Tenure, *supra* note 2, at 19-20.

The response of courts to the legality of heightened performance expectations has uniformly affirmed the right and the power of institutions to implement new standards. While the cases have been litigated in the context of untenured faculty challenging stricter tenure standards, nothing in the cases nor in the AAUP standards themselves suggests that an institution is forever bound by the performance standards that existed at the time an individual faculty member was granted tenure. While the procedural protections afforded by tenure remain undiminished, the right of a college or university to determine for itself the quality and quantity of performance that it will expect from its faculty, and to enforce those requirements vigorously, appears, to be unrelated to tenure.

Preventive Law for School Administrators

Harold L. Hawkins

School administrators and school boards are in legal difficulty. Too often school officials find themselves in court defending causes that are not easily defended; on the other hand courts sometimes appear to want to take over the administration of the public schools. This situation results neither from the incompetence of educators nor from a conspiratorial judiciary. Instead, an era of litigation in education has evoked an untenable relationship between schools and the courts that demands reexamination.

This chapter reflects on education and the law. Its *focus* is the need for a revised relationship between schools and the courts. The concept of preventive law is presented as a basis for a new perspective on law in education. The legal reform advocated is derived from a brief overview of conflict resolution models and the use of strategies for reducing litigation.

The challenge of developing a revised relationship represents an opportunity for the legal profession as well as educators. Preventive law, like due process which resulted from legal reform, has the potential for significant impact on educational practice. An emerging concept, preventive law, points to a way out of the current morass of litigation that is costly in time, dollars, and emotional overload. In fact, the idea of prevention is so startlingly simple that one might proclaim its advent as a rediscovery of common sense.

Brown, recognized as one of the first to advocate preventive law, put it concisely this way: "It usually costs less to avoid getting into trouble than to pay for getting out of trouble."¹ During his practice in corporate law, Brown recognized that through unnecessary mistakes legal rights are often jeopardized. Although the concept of preventive law is less well known in educational settings, it could be substantially helpful in ending the era of litigation. How does this emerging view of education and the law work? Its application in dispute settlement can be stated as: "In education, preventive law is the voluntary revision of school policies and procedures to lessen or obviate potential litigation."²

1. L. Brown, *Preventive Law* 3 (1950).

2. H. Hawkins, *Preventive Law: Strategies for Avoidance of Litigation* (publication pending).

Note that the stated definition speaks of the need to reduce litigation. Preventive law recognizes that some litigation is essential. Judicial review has provided education with many instances of improved procedure, clarification of meaning, and protection of individual rights. It is obvious that not all litigation can be or should be avoided. Rather the emphasis in preventive law is the avoidance of unnecessary law suits and the increased potential for the school district to have its actions affirmed by the courts when there is judicial intervention. The concept of preventive law makes one basic premise: *The greater the use of the preventive law strategies in public schools, the less the need for conflict resolution through litigation.*

Adjudication: Wrongs and Remedies

Disagreements in school districts too often result in adjudication, the intervention of the judiciary in conflict resolution. When a dispute moves to this level of decision-making, the legal system replaces educational administration as the key to the search for justice. Hudgins and Vacca describe the heart of adjudication in these terms:

At the very core of the American legal system is the principle that for every *wrong* (violation of a right) done to an individual by government or by another individual, there should be a *remedy* (some form of compensation or relief) provided. A citizen must be protected from injustice and must also have some place to go (when all else fails), to seek justice. In our social structure the courts of this nation exist for such purposes.³

In schools, the most abundant area for litigation has been racial discrimination, protection against other individual constitutional deprivations has followed closely. Other prolific problems have related to lack of due process, use of corporal punishment, church-state issues, student dismissal, and contract non-renewals. Discussion at a recent joint school board-superintendent conference in San Antonio revealed another significant cause for concern. Liability claims in school districts are a major threat to legal and fiscal stability. Since *Monell v. Department of Social Services of the City of New York*,⁴ the fastest growing area of litigation has involved the various types of liability. With this 1978 decision establishing school districts as "persons" in section 1983 cases, school district treasuries have been viewed by many as open markets for litigation. Law suits are vigorously on the increase in personal injury torts, defamation cases, and civil rights deprivation. As a result, seven of ten liability insurance carriers in Texas have discontinued their coverage to school districts and the remaining three have increased premium rates by staggering proportions.

3. H. Hudgins, Jr. & R. Vacca, *Law and Education: Contemporary Issues and Court Decisions* 3-4 (1974).

4. 436 U.S. 658 (1978).

Wrongful actions by school boards and administrators in the context of legal liability may result from these potential problem areas, to name a few: (1) district owned vehicles; (2) corporal punishment; (3) teacher performance evaluations; (4) inappropriate due process; (5) inadequate duty of care through employment of untrained personnel; (6) unsafe school buildings; (7) overcrowded physical space in certain types of instruction; and (8) failure to correct identified hazards. How does this developing problem relate to preventive law? Preventive law recognizes the transfer of risk through adequate insurance protection, but it also stresses the reduction of claims through the systematic review of operational policies and procedures. Putting its own house in order through preventive law measures will not only lessen the number of legal "wrongs" but will increase the capability of the school district to obtain and maintain adequate insurance protection. Actually some authorities suggest that risk management through insurance coverage should be the last step taken by the school board, after all other preventive measures have been accomplished.

Whether the context is legal liability or issues in curriculum, "putting the house in order" often involves careful consideration of school district policies. Preventive law is perhaps most easily practiced in the context of policy review. Although even in policy revision the attempt to prevent "wrongs" is often more involved than at first seems apparent. There are at least five factors relevant to school districts that provide opportunities for improvement. These are: (1) lack of school policy(ies), (2) vague and unclear policies, (3) disregard for affirmed policies, (4) inconsistent application of existing policies, and (5) unwillingness to admit error.

Case law is replete with litigation arising from poorly administered policies. Sometimes school districts lack policies to serve specific needs. In *Green v. County School Board*,⁵ the court required that the board must recognize and institute a policy regarding school district integration that would be effective. The vagueness of policy issue was determined by the court in *Elfrant v. Russell*.⁶ A district policy demanding a disclaimer of association with "subversive organizations" was overturned on the basis that its meaning was too vague for a teacher to safely swear to. Inconsistent application of a policy for renting the school districts' auditorium to civic groups at nominal cost was shown in a 1973 case. The National Socialist White Peoples' Party had applied to use the auditorium. The board's refusal was contrary to their policy and not upheld by the court.⁷

Policy administration can also cause problems for non-public schools. The failure of a private school to keep educational records required by the state to license a student to practice skills taught at vocational

5. 391 U.S. 430 (1968).

6. 384 U.S. 11 (1966).

7. *National Socialist White People's Party v. Ringese*, 473 F.2d 1011 (1973).

school, was ruled a disregard of approved policy. The student, therefore, was justified, the court said, in not paying his tuition.⁸

In a 1980 teacher contract non-renewal case, an unwillingness to admit error by the board of the Kingsville (Texas) Independent School District demonstrated how prolonged and costly litigation can be. In this case, the teacher was dismissed by board action which was independent of stated policy, and counter to superintendent and principal recommendations. The district lost its case after litigation that covered a span of seven years and exceeded \$143,026 in cost.⁹

A Rationale for Preventive Law

The acceptance of preventive law may be enhanced by understanding the way in which conflicts (disagreements) in educational institutions are treated. The administrative/judicial functions of administrators and school boards include a basic responsibility for settling disputes. Figure 1 depicts the process used generally in school districts for conflict resolution. The appropriate school district personnel operating within the internal forces of the district and the community typically apply policies and procedures to examine their actions (decisions) that are alleged to be incorrect. The administrative mechanism seeks and applies solutions, usually this process which also may need to utilize external forces, or resources, will accommodate, as best it can, the needs generated by the problem. The model designates this process as existing in an *active* mode since its use is somewhat regular and routine.

The litigation model of problem resolution is demonstrated in Figure 2. Here the attempt to seek a harmonious solution is viewed as in the *reactive* mode; the pressures for settlement are stronger, decisions are not initially accepted and the result eventually necessitates the involvement of the judicial system. With the court participation the resolution to the conflict comes from outside school system channels and is a forced remedy. Often the litigation model results in decisions unacceptable to one party and sometimes not to either. Eventually the litigation that has moved through various appellate levels will provide an end to the disagreement. The era of litigation in education during the past 25 years reflects a disproportionate dependence upon judicial remedies by school boards as well as those individuals alleging wrongs.

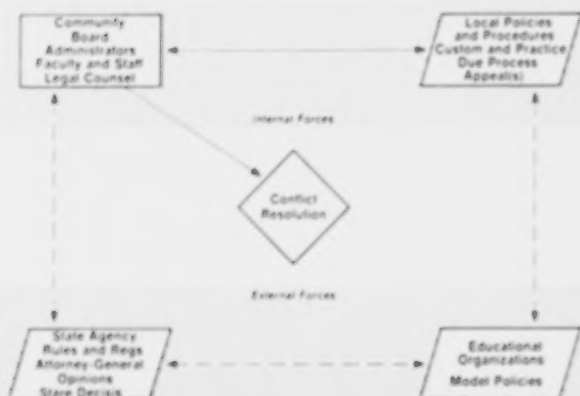
The preventive law model presented in Figure 3 establishes the preventive law process through which all school district policies, procedures, and decisions are screened. This approach to conflict resolution is viewed as in a *proactive* mode because it is based on the use of corrective action before specific problems arise. Note that not all litigation is avoided. In theory, both the total volume of conflicts is reduced and the use of the courts for litigation is substantially lessened. The preventive law process by its very nature produces a more positive relationship between the school and the courts.

8. *Sciortion v. Leech*, 242 So. 2d 269 (1971).

9. *Kingsville Independent School District v. Cooper*, 611 F.2d 1109 (1980).

Figure 1

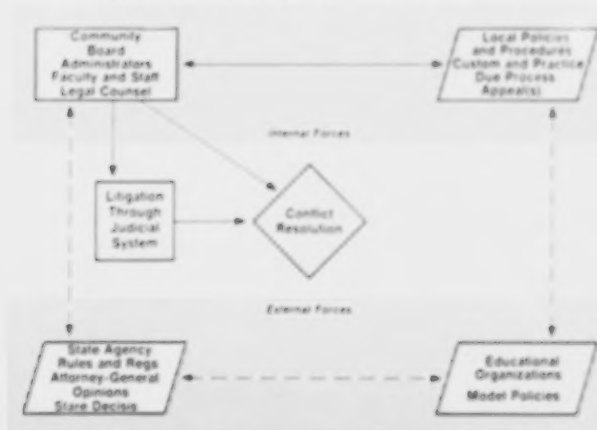
Political/Administrative Model Active Mode for Conflict Resolution



Source: Harold L. Hawkins, *Preventive Law: Strategies for Avoidance of Litigation in Public Schools*, University Council for Educational Administration, Tempe, Arizona (Publication pending)

Figure 2

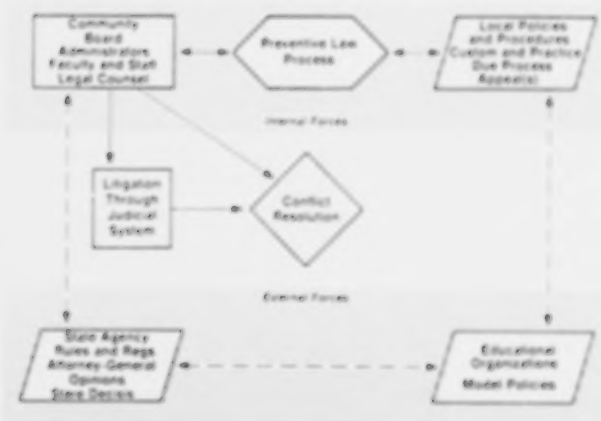
Litigation Model Reactive Mode for Conflict Resolution



Source: Harold L. Hawkins, *Preventive Law: Strategies for Avoidance of Litigation in Public Schools*, University Council for Educational Administration, Tempe, Arizona (Publication pending)

Figure 3

Preventive Law Model Proactive Mode for Conflict Resolution



Source: Harold L. Hawkins, *Preventive Law: Strategies for Avoidance of Litigation in Public Schools*, University Council for Educational Administration, Tempe, Arizona (Publication pending).

Preventive Law Strategies

Public school administrators and boards of education will find the idea of preventive law worthy of consideration. Understandably some will maintain that much of the process is already in use; there is some truth in this point of view. What has been lacking, however, is an understanding of the comprehensive nature of prevention and the value that its use can be to education. Freis¹⁰ stresses three essential aspects of preventive law implementation. These are: (1) commitment, (2) communication, and (3) compromise. It is clear that before tangible benefits will accrue fully, a commitment to the proactive approach basic to preventive law is necessary. An acceptance of the belief that schools must themselves resolve a greater portion of their conflicts might appear relatively easy. Nevertheless, it is the extensive voluntary effort that ensues which will test the degree of commitment that exists. Communication is a major aspect of any plan to exercise increased prevention. To be effective, audiences of that communication should include levels of faculty, staff, and parents. The third emphasis is that of compromise. Freis believes

10. Kelly Freis, legal counsel for the Houston (Texas) Independent School District offered these views at the joint meeting of the Texas Association of School Boards and the Texas Association of School Administrators at San Antonio, September 28, 1985.

that in the legal arena there must be some give and take. Progress often must be incremental when changes are attempted. Compromise depends upon a willingness to engage in efforts to identify and accept trade-offs.

Hawkins suggests a number of strategies that are useful to those ready to implement preventive law practice in their school systems. His techniques include:

- Strategy 1:** Increased communication on a regular basis among teachers, administrators and parents.
- Strategy 2:** Improved understanding of education law.
- Strategy 3:** Strengthened consistency in the implementation of policies and procedures.
- Strategy 4:** Periodic internal review of school district policy.
- Strategy 5:** Development of systems for external preventive law audits.¹¹

These strategies may be applied in a non-sequential manner; each is independent of the others. The ease of implementation, though, from the first to the last strategy follows a somewhat increasingly difficult pattern. Strategies 1-3 require concentrated effort but can be used with relatively little extra time and expense on the part of the school system. Strategy 4 constitutes a significant step in terms of commitment. The internal review might be conducted by a board administrator committee. Lay representation would be appropriate as well as the technical assistance of legal counsel. The external audit as strategy 5 is still in the developmental stage. Instrumentation and procedures have been discussed by preventive law advocates. Progress, however, has been limited to preliminary attempts to define the process. The voluntary external audit differs from internal review in its formal structure and its emphasis on outside legal expertise. The audit team is presumed to be composed, at least partly, of individuals from outside the local school district.

A Closing Word

Preventive law is a viable concept. Its relevance at this time to education is readily apparent. One should not, however, consider it a panacea for all the legal problems in education. The proactive approach, if practiced, jointly by school officials and attorneys will produce a new legal relationship leading toward more effective school administration.

11. See H. Hawkins, *supra* note 2.

Minimizing Liability for the College Administrator: Female Student Protection

Steve W. Batson

Although it may not indicate an increasing crime rate, many college campuses are experiencing more frequent reports of campus crime.¹ As a result of the violence and activism of the 1960's and 1970's, many schools revised their disciplinary codes making them more effective and possibly inspiring more reporting of crimes.²

One category of crimes reported more frequently in the past few years is sexual assault of female students. Although most experts estimate that forty-seven to ninety percent of all rapes are never reported, the Federal Bureau of Investigation crime report indicated a total of 84,233 rapes for 1984 — a 6.7 percent increase over 1983.³ Many women fail to report being raped for several reasons, including lack of faith in the police, fear of unsympathetic treatment, embarrassment of publicity, fear of assailant reprisal, and apprehension of further victimizing by the court proceedings.⁴

The most common forms of sexual assault are "acquaintance gang rape"⁵ and "date rape."⁶ Preliminary results of a three-year study of 6,500 students at thirty-five universities sponsored by *Ms. Magazine* and conducted by a psychologist from Kent State University indicate that one out of eight women had been raped. Forty-seven percent of those raped said the rapists were either first dates, casual dates, or romantic acquaintances. A 1984 survey of 500 students at Brown University found that sixteen percent of the women had been raped by dates or acquaintances, and eleven percent of the male students surveyed indicated they had forced a woman to have intercourse.⁷

According to a new study conducted by the Project on the Status and Education of Women of the Association of American Colleges, gang rapes on college campuses are on the increase with seventy percent

1. Administrator Special Report, *Crime on Campus: A National Perspective I* (1985).

2. *Id.*

3. The Dallas Morning News, Nov. 10, 1985, at 4F, col. 1.

4. Territo, *Campus Rape: Determining Liability*, 19 Trial 100 (1983).

5. The Chronicle of Higher Education, Oct. 16, 1985, at 35, col. 1.

6. The Dallas Morning News, *supra* note 3, at 4F.

7. *Id.*

occurring at fraternity parties.⁸ The study also found that such incidents also occur in residence halls and at off-campus parties with twenty percent involving varsity athletes. From a study of fifty cases, it was shown that the typical victim is a young woman who has had too much alcohol or too many drugs and is assaulted by two or more males.⁹ The study found that acquaintance gang rape was a regular occurrence on a few campuses and that all types of colleges and universities, public and private, had experienced this problem.¹⁰

A third category of assault/rape is committed by the non-student total stranger who wanders onto campus or purposely enters a campus seeking out a victim.

Third Party Liability

Although not a new phenomenon, civil suits against perpetrators of sexual assaults are becoming more commonplace.¹¹ In an effort to secure compensation for injuries, women are also suing a third party — the college or university on whose campus the assault occurred. To remove the case from the general rule of no liability, the victim must show that a "special relationship" existed between her and the third party that entitles her to demand protection from harm.¹² Theories of third party liability include landlord-tenant (most commonly used in college campus cases), business-patron, innkeeper-guest, common carriers, employer-employee, parent-child, and government-citizen.¹³

As more assault and rape incidences are reported by female students, the more institutions are being held liable for the safety of these students. Although this is still an evolving area of tort law¹⁴, several recent cases given an indication of the emerging institutional responsibilities being defined by the courts.

Foreseeability and Breach of Duty

*Miller v. State*¹⁵ involved a nineteen year-old junior at SUNY at Stony Brook who was confronted in her dormitory laundry room at 6:00 A.M. one morning by a man with a large butcher knife. Her assailant blindfolded her and led her through two unlocked doors up to a third floor room where she was raped twice and threatened with death. She was

8. The Chronicle of Higher Education, *supra* note 4, at 35.

9. This study will be published in December 1986 as "Campus Gang Rape: Party Games?" by the Project on the Status and Education of Women, Association of American Colleges, 1818 R Street, N.W., Washington, D.C. 20009.

10. The Chronicle of Higher Education, *supra* note 4, at 35.

11. Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 Harv. Women's L.J. 105, 106 (1981).

12. *Id.* at 110.

13. *Id.*

14. NOLPE Notes (Nat'l Org. on Legal Probs. of Educ.), April 1985, at 1.

15. 478 N.Y.S.2d 829 (N.Y. App. Div. 1984).

then led out to the parking lot and abandoned. She sued to recover personal injuries, and the trial court awarded her \$25,000 based upon the defendant's negligent failure to provide adequate police protection and a breach of duty to protect its tenants from reasonably foreseeable criminal assaults by outsiders.¹⁶ Several facts stood out in this case. Strangers were not uncommon in the dormitory hallways, and there had been reports to security of men in women's bathrooms. The claimant had complained twice about lounge and hallway loiterers. The student newspaper had reported numerous dormitory crimes, including armed robberies, burglaries, criminal trespass and a rape. Despite these incidences, none of the ten entrance doors to the dormitory were ever locked.

The student appealed on the ground of inadequacy of damages, and the state cross-appealed on the question of liability. The New York Appellate Division, reversed the decision and dismissed the claim, and the student again appealed. The Court of Appeals of New York found sufficient evidence that "the State's failure to lock the outer doors was a breach of the State's duty and a proximate cause of the rape."¹⁷ The case was remitted to the appellate division for determination of facts and issues not reached on appeals. Addressing the role of the state as landlord, the court stated that "a landlord has a duty to maintain minimal security measures, related to a specific building itself, in the face of foreseeable criminal intrusion upon tenants."¹⁸ Does this mean that the court felt that the state should be liable for failure to keep all dormitory doors locked? In a concurring opinion, Justice Kaye stated that "with several thousand students living in 27 dormitories at Stony Brook alone, each dormitory presumably having several entrances, that would be a truly onerous—if not impossible—obligation for any security force, involving the allocation of police resources."¹⁹

In rendering its decision, the court stated that this type of case must be "carefully scrutinized"²⁰ to determine where it falls along the continuum spanning the spectrum from a proprietary capacity as a private landlord with a certain duty of care all the way over to a police capacity involving executive decisions regarding allocation of security resources, governmental functions, and subsequent immunity. The court concluded that "ownership and care relating to buildings with tenants has traditionally been carried on through private enterprise, specifically by landlords and thus constitutes a proprietary function when performed by the state."²¹

In the *Miller* case, substantial evidence of previous incidences indicated that there was "a reasonably foreseeable likelihood of criminal

16. *Id.* at 831.

17. *Id.* at 833.

18. *Id.*

19. *Id.* at 834 (Kaye, J., concurring).

20. *Id.* at 832.

21. *Id.* at 833.

intrusion"²² into the dormitory. In a similar case absent of repeated criminal activity, the court held for the institution. In *Brown v. North Carolina Wesleyan College, Inc.*²³, following a basketball game three cheerleaders were abducted by a lone male and driven to a nearby rock quarry where one of the girls was raped and murdered. The abductor was subsequently tried and convicted of these crimes²⁴, and the administratrix of her estate brought action against the college alleging negligence. The most serious previous crimes on campus were a business office burglary ten to twelve years ago, a vandalism of vending machines five years ago, and a reported attempted rape two years ago. The campus of 408 students was regularly patrolled by the sheriff's department; had a security staff of three full-time students, two full-time non-students, and a director of security; and had at least one security officer on duty each hour who, among other duties, reported lighting problems, replaced burned out exterior bulbs, and was equipped with a uniform, mobile radio, and security vehicle.

The superior court granted summary judgement in favor of the college, and the administratrix appealed. The Court of Appeals of North Carolina, in affirming the decision of the lower court, stated that "foreseeability of a criminal assault determines a college's duty to safeguard its students from criminal acts of third persons" and "the forecast of evidence does not show a repeated cause of criminal activity which would have imposed a duty upon defendant to keep its campus safe."²⁵

Palsgraf Formulation

The admittance of a conditionally released prisoner as a student and the subsequent rape and murder of a female student and the stabbing of her male friend was the subject of a New York case, *Eiseman v. State*.²⁶ State University College at Buffalo admitted a conditionally released prisoner from Fishkill Correctional Facility as a full-time residential student in a program for educationally disadvantaged known as SEEK (Search for Education, Elevation, and Knowledge). Six months later at an off-campus apartment, he raped and murdered a female student and stabbed her male friend six times. The surviving non-student and the father of the deceased student sued the institution for personal injuries, pain and suffering, and wrongful death asserting that the state was negligent in failing to inquire into the prisoner's background, failing to inform college officials of his history of psychiatric disorders and heroin abuse, releasing him from prison without precautionary conditions, and failing to provide parole supervision.

22. *Id.* at 829.

23. 309 S.E.2d 701 (N.C. Ct. App. 1983).

24. See *State v. Smith*, 292 S.E.2d 264 (N.C. 1982).

25. *Brown v. North Carolina Wesleyan College, Inc.*, 309 S.E.2d 701, 703 (N.C. Ct. App. 1983).

26. 489 N.Y.S.2d 957 (N.Y. App. Div. 1985).

The student prisoner had a prior arrest record of twenty-five charges including assault, robbery, and drug-related crimes. Following each parole he reverted to heroin abuse [having been a heroin abuser for twenty-six years] using up to twenty-five bags a day. He had been psychiatrically examined five times and had been diagnosed as suffering from "chronic schizophrenia, paranoid type, with impulsive-explosive personality, a high criminal potential, a high mental pathology potential, and a low rehabilitation potential."²⁷ He had also attempted suicide once while in a maximum security facility.

In applying for the SEEK program, he listed his present and former addresses and the source of a high school equivalency diploma at correctional institutions. His three references resided in towns in which he had never lived. A prison physician, in completing the required health form, responded negatively to any history of emotional instability, failed to indicate long history of heroin abuse, and gave no response to previous psychiatric care. Although he had been admitted for the fall term, he ran into problems with prison authorities and attempted suicide, and his admission was delayed until the winter semester. College officials made no attempt to check into these problems.

The court held that the prison physician's failure to inform the college of a potential danger was negligent and proximately caused the rape and murder of the student; that the physician had no duty to inform college of potential danger to non-student; that the college was negligent in entering the program without establishing rational criteria, and that the murdered student was within the scope of duty assumed by the college. The court stated that "the scope of the College's duty herein is the well-known *Palsgraf* formulation that 'the risk reasonably to be perceived defines the duty to be obeyed.'"²⁸

Special Relationship

In *Peterson v. San Francisco Community College District*,²⁹ an assailant jumped from behind "unreasonably thick and untrimmed foliage and trees"³⁰, assaulted and attempted to rape a student as she ascended a stairway in the college's parking lot. The student sued the institution for damages under California's Tort Claims Act and the trial court dismissed the case. The plaintiff then appealed to the California Supreme Court with two causes of action: first, that by virtue of a special relationship between the school district and herself, the defendants had a duty to protect her and to warn her of possible danger; second, that defendants are liable for maintaining a dangerous condition of property which, together with the assault, caused her injuries.

27. *Id.* at 961.

28. *Id.* at 965, quoting *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 104 (N.Y. 1928).
29. 685 P.2d 1193 (Cal. 1984).

30. *Id.* at 1195.

The appellate court reversed the trial court's ruling holding that the community college district had a duty to protect students from reasonably foreseeable assaults, that the district was immune from liability for failure to provide adequate police protection, that the district could be held liable for failing to trim foliage and for failing to warn students of danger, and that the plaintiff had stated a cause of action under the Tort Claims Act provisions.³¹ The court stated that:

In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.³²

The institution was aware of similar crimes in the same location, had not trimmed the foliage to increase visibility, and had not warned the student of the possible danger even though they had issued a parking permit in return for a fee, had invited her onto campus property, and had enrolled her as a student. These actions had established a special relationship between the institution and the student giving rise to a duty to protect her from assault.

Erosion of Governmental Immunity

*Ziss v. Cuyahoga County Community College District*³³ involved a community college student who was robbed and beaten by an armed assailant while she was walking to the campus library. The student sued the college alleging negligence in failing to maintain adequate security, proximately resulting in her injuries. The trial court granted a motion for summary judgment on the ground of sovereign immunity, and the student appealed. The appellate court, citing several previous cases, held "that defense of sovereign immunity was not available to community college districts in tort action for negligence."³⁴ The court's reasoning involved the fact that community colleges could purchase liability insurance and that the "archaic public policy... that an individual should suffer an injury rather than a governmental entity be inconvenienced"³⁵ had been repudiated by previous decisions. The case was remanded for further consideration.

An underlying issue in the appeal of *Cutler v. Board of Regents of State of Florida*³⁶ was "whether sovereign immunity acts as a bar to recovery for damages sustained by appellant when she was assaulted

31. *Id.* at 1193.

32. *Id.* at 1201.

33. 468 N.E.2d 752 (Ohio Ct. App. 1983).

34. *Id.* at 753.

35. *Id.*

36. 459 So. 2d 413 (Fla. Dist. Ct. App. 1984).

and raped by three armed assailants in her dormitory room on campus of Florida Agricultural and Mechanical University."³⁷ The student had contracted for living accommodations in the dormitory, and the university had represented this as a safe and secure area despite numerous alleged assaults, attacks, and rapes of FAMU female students.

The initial complaint dismissed by the trial court for failure to state cause of action alleged liability for breach of warranty and habitability, failure to control conduct of third persons, breach of duty to anticipate, misrepresentation, and failure to maintain common areas. The appellate court reversed and remanded holding that the "student was entitled to amend her complaint to include sufficient factual allegations, if possible, which would entitle her to relief under the various causes of action."³⁸ Among other documents, the appellant failed to attach to her complaint a copy of her rental contract. In remanding the case, the appellate court stated:

Although Florida recognizes no duty on the landlord's part to protect his tenants against criminal conduct of third persons merely by reason of the landlord-tenant relationship, recent Florida decisions have held that a landlord, who recognizes and assumes the duty to protect his tenants from foreseeable criminal conduct, may be liable if he fails to take reasonable precautions to prevent injury to his tenants from this conduct.³⁹

However, the court stated that "it does not appear to be settled in Florida whether liability may be predicted on foreseeability alone ... absent an allegation that the landlord expressly or impliedly assumed such a duty."⁴⁰ In addressing the defense of sovereign immunity, the court noted that the duty to warn of a known danger is an "operational-level" function of government [as opposed to a "judgmental, planning-level" function] and not subject to sovereign immunity.⁴¹ The court noted in conclusion "that sovereign immunity is not a bar to an action on the breach of an express, written contract entered into by a state agency under its statutory authority"⁴² but failed to extend this reasoning for a breach of an express or implied warranty of habitability.

Another Florida case, *Relyea v. State*⁴³, involved two female seniors at Florida Atlantic University who were assaulted in the parking lot by three men and then driven to a secluded area and murdered. Parents of both girls sued the state, board of regents, chancellor, and regents' insurance company for negligence. The trial court held for the univer-

37. *Id.* at 414.

38. *Id.* at 413.

39. *Id.* at 415.

40. *Id.*

41. *Id.* at 416.

42. *Id.* at 417.

43. 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980).

sity, the plaintiffs appealed, and the appellate court affirmed the trial court's decision stating that "the allegations of negligence fall within the definition of a discretionary function ... whether to provide security guards, parking attendants, security gates, and the numbers thereof, are clearly discretionary decisions, partially based upon budgetary limitations controlled by the Legislature."⁴⁴ The plaintiffs, according to the ruling, had failed to show foreseeability of violent assaults. There had been no serious crimes since the founding of the school in 1963.

A 1985 New Jersey case, *Jansson v. Fairleigh Dickinson University*, involved two female students who were brutally attacked and repeatedly raped in their dormitory. They sued the university alleging negligence and seeking compensatory and punitive damages. The lower court granted defendant's motion to dismiss based on apparent failure of plaintiffs to respond to interrogatories. Actually, their counsel never forwarded their answers to the defense counsel but continued to assure his clients that a trial was imminent. The appellate court remanded the case stating that "the students were not to be penalized for misconduct of their attorney."⁴⁵

*Duarte v. State*⁴⁷ is a California case in which a mother sued for the rape and murder of her daughter while residing in a dormitory on the campus of California State University at San Diego alleging breach of warranty of habitability, negligence, and negligent misrepresentation. There had been a chronic pattern of violent assaults, rapes and attacks on females, and the pattern escalated prior to this rape and murder. The plaintiff alleged that the defendant not only was aware of the increasing pattern of violence but also attempted to keep these facts from the campus community. The trial court held for the state but the appellate court reversed the decision holding that, under the landlord-tenant relationship and traditional tort rules, the university owed a duty of care to provide a safe residence, that negligent misrepresentation as a cause of action was not barred by governmental immunity as neither was action based on landlord-tenant contract or implied contract of habitability, and that the university had no immunity from liability for employees' negligence.⁴⁸

Quoting *Muskopf v. Corning Hospital District*, the court stated that "when there is negligence, the rule is liability, immunity is the exception."⁴⁹ The court further commented that "where a dangerous condition exists upon government property, the sovereign immunity defense is not available."⁵⁰

44. *Id.* at 1382.

45. 486 A.2d 920 (N.J. Super. Ct. App. Div. 1985).

46. *Id.* at 920.

47. 151 Cal. Rptr. 727 (Cal. Ct. App. 1979).

48. *Id.* at 727.

49. 359 P.2d 457, 462 (Cal. 1961).

50. *Duarte v. State*, 151 Cal. Rptr. 727 (Cal. Ct. App. 1979).

Conclusions

As the incidence of rapes and assaults on college campuses, or at least the incidence of reports, continues to rise, the likelihood of increased third party litigation involving colleges and universities will continue. This is particularly likely with the increased awareness of gang and acquaintance rapes coupled with a general increase in rapes, assaults, and murders.

Institutions need to be fully aware of potential and actual assaults, to provide an adequate level of campus security and comprehensive policies to discourage such activities, and to respond rapidly when assaults do occur. Recommendations include:

1. Strong and well-publicized policies and judicial procedures to deal with gang and individual rapists;
2. Rape prevention programs targeted to high risk groups;
3. Increased security lighting in problem areas with regular monitoring and maintenance;
4. Scrutiny of landscaping patterns to avoid hiding places near dormitories, parking lots, and remote locations;
5. Review of class scheduling to avoid scattered evening classes in remote buildings;
6. Installation of security telephones at potential trouble spots with direct connection to the security offices;
7. Increased dormitory security, including deadbolt locks;
8. Special rape prevention and sensitivity training for security officers; and
9. Evening escort services provided by security or campus organizations.

Searching of Students after New Jersey v. T.L.O.

Tyll van Geel

Disciplining a student for an infraction of a school rule may legally only be accomplished if there is relevant evidence to support the conclusion that the student has violated the rule.¹ Gathering this evidence sometimes entails searching students and their lockers; thus the question arises: what limits are there on the authority of school officials to search? The question is inevitably one of balance. Should school officials remain free of the restraints of the fourth amendment in order to maximize their ability to maintain the order and safety of the school, or should they be restrained by the fourth amendment in order to protect the student's interest in privacy?² The Supreme Court addressed this question for the first time in January of 1985 in a case entitled *New Jersey v. T.L.O.*³ This chapter begins with a summary of *T.L.O.* and then turns to an exploration of the meaning of the opinion and to a number of issues which the opinion does not address.

The Opinions in *New Jersey v. T.L.O.*

It all started when a teacher found two girls, including the 14-year-old T.L.O., smoking in a school lavatory. The teacher escorted the girls down to the principal's office where, under questioning by Assistant Vice Principal Choplick, one girl admitted she had been smoking. T.L.O., however, denied she had been smoking, and claimed she did not smoke at all. Mr. Choplick invited T.L.O. into his private office and demanded to see her purse. On opening the purse he found a package of cigarettes which he removed from the purse, revealing a package of cigarette rolling papers. Because such rolling papers were associated with the use of marijuana, Mr. Choplick suspected a closer examination of the purse would yield additional evidence of drug use. A further

1. Disciplining a student without evidence that the student violated a school rule would be a violation of that student's right to procedural and, perhaps also, substantive due process.

2. The fourth amendment states: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

3. 105 S. Ct. 733 (1985).

thorough search of the purse, including the opening of zippered compartments, revealed a small amount of marihuana, a pipe, a number of empty plastic bags, \$40.98 in change and single dollar bills, an index card that appeared to be a list of students who owed money to T.L.O., and two letters further implicating T.L.O. in marihuana dealing. On the basis of this evidence, which was turned over to the police, and a confession by T.L.O., the state brought delinquency charges against T.L.O. Arguing that the search of her purse violated the fourth amendment, T.L.O. moved to suppress the evidence found in her purse, and the confession which she claimed was tainted by the allegedly unlawful search. The case ultimately reached the New Jersey Supreme Court which ruled: (1) the fourth amendment did apply to searches conducted by school officials; (2) a search warrant was not needed for a school official to search; (3) a warrantless search would be permissible if an official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order"; (4) the search of T.L.O. was impermissible under this standard because mere possession of cigarettes did not violate school rules and had no bearing on the accusation against her, and that Mr. Choplick did not have a reasonable suspicion that T.L.O. had cigarettes in her purse since no one had furnished him with information to that effect, and that the evidence he found when he removed the cigarettes did not justify extensive "rummaging" through the purse; therefore, (5) the evidence of drug dealing was not admissible in the criminal proceeding brought against T.L.O.⁴

On appeal Justice White writing for the majority of the Supreme Court agreed with the New Jersey Supreme Court that the fourth amendment did apply in the context of public schooling, that school officials did not need to obtain a warrant to search students, and that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."⁵

Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception," ... second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reason-

4. *Id.* at 738.

5. *Id.* at 743-44. The Court concluded that since school officials acted as representatives of the state and "not merely as surrogates for the parents," the protections of the fourth amendment were available to students. Then, after balancing the student's interest in privacy and the school's "equally legitimate need to maintain an environment in which learning can take place," the Court concluded that to impose a warrant requirement "would unduly interfere with the maintenance of swift and informal disciplinary procedures needed in the schools." Balancing the same considerations, the Court concluded the usual requirement, that a search be based only on "probable cause" that a violation of law has occurred, needed to be modified.

able grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.⁶

Based on this standard the Court reversed the New Jersey Supreme Court's conclusion that the search of T.L.O.'s purse was unreasonable. The Court first noted that there were two separate searches involved in the case, the search for the cigarettes and the second search for marihuana. "Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marihuana had the first search not taken place." The first search was reasonable, concluded the Court, because (1) possession of cigarettes was relevant in the sense that it helped to make more probable that she did violate the no smoking rule, and (2) because the teacher's accusation made reasonable the hypothesis T.L.O. was carrying cigarettes.⁷ And, the Court concluded, the second search was reasonable because: (1) the picking up of the package of cigarettes was a natural reaction and not a constitutional violation; (2) the finding of the rolling papers in turn gave rise to a reasonable suspicion T.L.O. was carrying marihuana in her purse, justifying the search which turned up the pipe, plastic bags, and money; and (3) this finding in turn further justified the extension of the search to a separate zippered compartment which revealed the index cards, the contents of which further justified the examination of the letters which were also found in the compartment. Because the Court concluded the search was reasonable under all the circumstances it did not decide the question of whether evidence seized by a school in violation of the fourth amendment had to be excluded from either or both a criminal proceeding or a school disciplinary proceeding.

Justice Brennan, joined by Justice Marshall, concurred that the fourth amendment did apply in the public school context, but otherwise they dissented from the majority opinion.⁸ Justice Brennan took the position that all full-scale searches could only proceed on a showing of probable cause, and that only in special cases could the search proceed without a warrant. He agreed that the warrant requirement was not appropriate in the public school context, but insisted that the probable cause standard ought to apply to the schoolhouse search. The majority's use of a

6. *Id.* at 744.

7. It was irrelevant that other hypotheses, e.g., T.L.O. borrowed a cigarette from someone else to smoke, were also consistent with the teacher's accusation. The requirement of reasonable suspicion "is not a requirement of absolute certainty." *Id.* at 746.

8. *Id.* at 742. Justice Powell also wrote a separate opinion concurring in both the opinion and judgment. Justice Blackmun concurred only in the judgment of the majority opinion.

balancing test⁹ to arrive at a different standard from the probable cause standard, he argued, was not supported by either precedent or policy. "[T]he Court fails to cite any case in which a full-scale intrusion upon privacy interests has been justified on less than probable cause."¹⁰ Justice Brennan also argued that the new standard of the majority would lead to unwarranted intrusions on student privacy, was ill-defined and would leave officials uncertain as to their authority, and that, in contrast, the probable cause standard was clearer and would have provided school officials all the authority they needed to protect the school.

In dissent Justice Stevens argued for a standard different from both the traditional probable cause standard and the standard adopted by the majority. His central concern was that the standard adopted by the majority would permit the search of students when teachers and administrators suspect that "the search will reveal evidence of even the most trivial school regulation or precatory guideline for student behavior."¹¹ He urged the adoption of a standard that would permit searches when teachers and administrators "have reason to believe that the search will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process."¹²

As important as majority opinion in *T.L.O.* is, it opens a number of significant questions: (1) What does the *T.L.O.* "reasonable grounds" standard mean? (2) What does the standard governing the scope of a search mean? After examining these two questions we shall turn to a brief discussion of a number of other questions the opinion does not address but which are crucial issues in the application of the fourth amendment to schools: Are there certain efforts to gather evidence in schools to which the fourth amendment does not apply because it is not a "search" within the meaning of the fourth amendment? Are there circumstances when "reasonable grounds" is not to be used and a more lenient or tougher standard is to be substituted? What standard is to be followed if the police are involved in the search? What rules should guide the determination of whether a student has consented to a search? Does the exclusionary rule apply to illegal searches conducted by school officials?

The Meaning of the *T.L.O.* Standard

Assuming the *T.L.O.* standard does determine the constitutionality of a particular search, the difficult question arises as to the meaning of that

9. See *supra* note 5 and accompanying text.

10. *Id.* at 753.

11. *Id.* at 763. He said that, "For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity."

12. *Id.* (emphasis in original).

standard. It is important to stress at this point that the *T.L.O.* standard is a two-part test: first it must be determined that the search was justified at its inception, and second one must determine if the scope of the search itself was justified. In this section we examine the meaning of the test to be used in determining if the search was justified at its inception, the second prong will be examined later. It will be recalled that a search is justified if there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."

We begin by asking, reasonable grounds as to what? The way the standard is phrased it is clear that the mere fact there are grounds to believe a student has violated a school rule is not enough to provide a basis for a search. The standard requires that there be reasonable grounds that the search will turn up *evidence* of a violation. For example, if a student were caught cutting classes, thus violating a school rule, that by itself would not provide a basis for a search. In this instance there would be no grounds for believing the search would yield evidence tending to prove the violation. The majority in *T.L.O.* said that the search may be conducted for "relevant" evidence, and relevant evidence need not conclusively prove the ultimate fact in issue, i.e., was *T.L.O.* smoking in violation of school rules. Relevant evidence need only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹³ That is, the test is whether the evidence would lead a reasonable trier of facts (school official deciding a disciplinary case, or judge or jury deciding a juvenile offender case) to conclude that a fact is more probable than if that evidence were not available. The evidence would be irrelevant if one could not justify any reasonable inference from it as to the fact at issue.¹⁴ For example, a search for cigarettes could not be justified in a case in which the student was accused of setting off the school's fire alarm.

Turning to a different problem, it is clear that the reasonable grounds test is an objective test. That is, the search would not be permissible merely because the school official subjectively believed that he or she had grounds for the search.¹⁵ The question to be asked is whether a (hypothetical) reasonable school official would conclude there were reasonable grounds for conducting the search.¹⁶ What is "reasonable grounds" is determined from the perspective of this (hypothetical) reasonable school official with skill and knowledge the ordinary person

13. *New Jersey v. T.L.O.*, 105 S. Ct. at 746 (quoting *Fed. R. Evid.* 401).

14. E. Cleary, *McCormick on Evidence* 544 (1984).

15. *Beck v. Ohio*, 379 U.S. 89 (1964). The Supreme Court has said that the usual probable cause standard is an objective test.

16. It may be presumed this hypothetical school official has a certain amount of expertise which the lay person does not have with regard to, e.g., detecting the signs of drug use.

would not have. This suggests that the school official may have reasonable grounds, when in the same situation the lay person would not.¹⁷

We turn now to a closer examination of the notion of "reasonable grounds." One plausible interpretation of the *T.L.O.* standard is that it is merely designed to prohibit those searches undertaken without any evidence whatsoever supportive of a suspicion that the search will turn up evidence of a violation.¹⁸ Under this interpretation, only the totally baseless search would be prohibited. However, a search would be permitted if, for example, *any one* of the following factors were present: the student makes a furtive gesture to his pocket as the teacher approaches; flight as the teacher approaches; the student flees as the teacher approaches; the student gives evasive or false answers to questions; a student makes many quick visits to a toilet facility; the student is present in an area of the school where drug dealing is known to occur; the student is found in the presence of a known drug dealer; the student is found in possession of an item associated with the use of drugs or marihuana; the student is observed placing something in a sock or shoe; or the student is found in a place where there is an odor of burnt marihuana.¹⁹

The difficulty, of course, with this interpretation of *T.L.O.* is that it would inevitably lead to the searching of many innocent pupils who just happen to, for example, make what appears to be a furtive gesture or who just happen to be in the toilet facilities where there is the lingering smell of marihuana smoke of other students. This would seem to suggest that the *T.L.O.* standard should be interpreted as having more bite.

The illumination of the meaning of the *T.L.O.* standard can be carried a step further by looking more closely at some of the common forms of evidence school officials might have available when deciding whether they may constitutionally proceed with a search. Perhaps the most significant source of information for school officials is the informant, e.g., other students who report information. No doubt *T.L.O.* would permit school officials to rely on information from "citizen informers"

17. *LaFave, Search & Seizure* 462 §3.2 makes this point regarding the probable cause standard. Given the concern of the majority of the Court in *T.L.O.* for school security, it is likely it would also say that reasonable grounds is to be viewed from the standpoint of the reasonable, prudent teacher or administrator. It is important the law take advantage of their expertise. *But c.f.* *United States v. Ortiz*, 422 U.S. 891 (1975); *Johnson v. United States*, 333 U.S. 10 (1948); *United States v. Rosario*, 638 F.2d 460 (2d Cir. 1980).

18. 105 S. Ct. at n.96. The question of whether individualized suspicion is an essential element of the *T.L.O.* standard will be taken up below.

19. There are numerous student-search cases with facts similar to those listed in the text. *See, e.g.*, *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984); *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1749 (1985); *M. v. Board of Educ. of Ball-Chatham Community School Dist. No. 5*, 429 F. Supp. 288 (S.D. Ill. 1977); *State v. Young*, 216 S.E.2d 586 (Ga. 1975) *cert. denied*, 423 U.S. 1039 (1975); *In re L.L.*, 290 N.W.2d 343 (Wis. Ct. App. 1979); *People v. Scott D.*, 358 N.Y.S.2d 403 (N.Y. 1974); *see Commonwealth v. Dingfelt*, 323 A.2d 145 (1974).

alone, without more evidence, to conduct a search.²⁰ Still one must be careful in relying on the citizen informer. In one case the school bus driver saw two students exchanging something on the school playground which the bus driver, suspecting drugs, reported to school officials. The Ninth Circuit Court of Appeals concluded the subsequent strip search, which turned up nothing, was constitutionally impermissible.²¹ That case might be compared with another in which a student informed school officials he had seen other students passing back and forth what the student informer thought to be drugs. He also said one of these other students appeared to be in possession of a large amount of money.²² In this case the subsequent pocket search did reveal drugs, and the court concluded the search was reasonably based on the information provided by the student source.

School officials may overhear conversations between students providing a basis for suspicion. But a search based only in this sort of evidence should only be undertaken with caution.²³

Another widely used piece of evidence school officials rely on to justify a search is the furtive gesture and evasive move, i.e., the movement of the hand to the pocket as the school official approaches. *T.L.O.* should not be interpreted to say that a furtive gesture alone would be sufficient grounds to search.²⁴ But a furtive gesture combined with other facts, e.g., the student is illegally out of class, or the student is known to have

20. And in a case decided after the decision in *T.L.O.*, a federal district court said an anonymous tip from a person from a person claiming to be a parent of a student in the high school provided adequate grounds to search. *Martens v. District No. 220*, 620 F. Supp. 29 (N.D. Ill. 1985). A number of school search cases which arose before *T.L.O.* involved student informers. *M. v. Board of Educ. of Ball-Chatham Community School District No. 5*, 429 F. Supp. 288 (S.D. Ill. 1977); *In re C.*, 102 Cal. Rptr. 682 (Cal. Ct. App. 1972); *In re G.*, 90 Cal. Rptr. 361 (Cal. Ct. App. 1970); *In re Donaldson*, 75 Cal. Rptr. 220 (Cal. Ct. App. 1969); *In re Boykin*, 237 N.E.2d 460 (Ill. 1968). The reasonableness of the search was upheld in all these cases. The information from a citizen informer is typically considered sufficient to meet even the tougher probable cause standard. See *United States v. Harris*, 403 U.S. 573 (1971). The reliability of such an informer not shown to have been involved in criminal activities is presumed and corroboration of the informant's reliability is not necessary. *In re G.*, 90 Cal. Rptr. at 362.

21. *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984). But in one case a court said that though a telephone tip, that a student was carrying an illegal substance, to a school official from a security officer at a nearby Air Force base would not have met the probable cause standard but was sufficient to satisfy the reasonable suspicion standard. *In re J.A.*, 406 N.E.2d 958 (Ill. Ct. App. 1980).

22. *M. v. Board of Educ. Ball-Chatham Community School Dist. No. 5*, 429 F. Supp. 288 (S.D. Ill. 1977).

23. Compare, *A.B. v. State*, 440 So. 2d 500 (Fla. Dist. Ct. App. 1983), with *State v. F.W.E.*, 360 So. 2d 148 (Fla. Dist. Ct. App. 1978).

24. In *State v. Young*, 216 S.E.2d 586 (Ga. 1975) cert. denied, 423 U.S. 1039 (1975) as the assistant principal approached a group of three students, one student jumped up, put something down, and ran his hand in his pants. A pocket search of all three students

experimented with drugs in the past, might well be a sufficient basis to search under *T.L.O.*²⁵

A student's past record and reputation often play an important role in the decision to search. *T.L.O.* would at least stand for this much: the mere fact a student may have been disciplined for an offense in the past is not sufficient by itself to subject him to a search in the present.

The location in which a student is found may also contribute to a finding of reasonable grounds. Thus, if students are seen exchanging something in a location which is known to be a place used by students for smoking marihuana, the combination of the two factors together would seem to establish reasonable grounds on which to search.²⁶ This suggests that if the New York Court of Appeals had used the *T.L.O.* standard, the decision in *People v. Scott D.*²⁷ would have been different. In that case Scott, who had been under observation for six months for possible drug dealing based on information from confidential sources, was seen twice in the same morning within one hour entering a toilet room with a fellow student and exiting within 5 to 10 seconds. One of the fellow students reentered the toilet room and remained for some time. A search of Scott uncovered 13 envelopes of a white powder and a vial of pills. The court of appeals disallowed the search saying the entering of the toilet room produced only "equivocal suspicion;" the confidential information added little basis for a search because the basis of the sources of information or reliability of the source was not disclosed, and the information itself was merely that Scott was possibly dealing in drugs; and the fact Scott had been seen once eating lunch with another student suspected of drug dealing was all but "meaningless." It is difficult to believe the majority in *T.L.O.* would not have concluded that there were reasonable grounds to search, especially given what was written above about the use of informants.

yielded marihuana in the pocket of Young, apparently not the student who jumped up. In a decision issued prior to *T.L.O.* the court upheld the search saying the restraints imposed by the fourth amendment on school officials were minimal. The decision in *T.L.O.* would seem to preclude this result today since the Court did not stress that the fourth amendment standards in public schools imposed only minimal restraints. The search of all three students and not just the student who made the furtive gesture raises a question left open in *T.L.O.*: whether individualized suspicion is an essential element of the reasonable grounds standard. *New York v. T.L.O.*, 105 S. Ct. at 744 n.8.

25. In *State v. Baccino*, 282 A.2d 829, (Del. 1971), a student illegally out of class and known to have experimented with drugs resisted the vice principal's taking of his coat in order to assure he would follow him back to the class. The vice principal grew suspicious and searched the coat finding ten packets of hashish. The search was upheld in a case decided before *T.L.O.*

In another case when a teacher approached a student he made several clutching motions to his shirt pocket. He was also unusually quiet. Other students eyed the student, and the student turned away as the teacher walked past. The teacher suspected that the student had a knife or razor blade in his pocket because he had taken such items from the student on previous occasions. The search revealed marihuana and was found to be based on "reasonable suspicion." *In re L.L.*, 280 N.W.2d 343 (Wis. 1979).

26. *Tarter v. Rayback*, 742 F.2d 977 (6th Cir. 1984), cert. denied, 105 S. Ct. 1749 (1985).

27. 315 N.E.2d 466 (N.Y. 1974).

We turn now to another typical law enforcement problem that can also arise in schools. School officials who are investigating a school violation obtain information concerning the violator which is sufficiently general that it does not point exclusively to one particular individual. For example, in *In re Dominic W.*²⁸ two students reported that upon completion of their gym class they returned to find their common gym locker had been broken into and a watch stolen and two five-dollar bills. One of the boys said three other boys from the same gym class, which consisted of some ninety students, had been hanging around the lockers before gym class. The assistant principal interviewed two of these three boys, and one of these boys said he was not involved and did not know of anybody else who was. Next the assistant principal interviewed the third boy. He requested that he empty his pockets, which he did, producing ten one-dollar bills and a pack of cigarettes. Then the assistant principal felt appellant's pocket, and when he reached into one of them found the stolen watch. The court ruled the search to be impermissible under the probable cause standard.

In this case, the assistant principal clearly had insufficient information to lead a reasonably cautious person to believe that appellant committed the theft.

....

The unreasonable nature of the subject search is shown by the failure of the information provided to the assistant principal to place the appellant in a more suspicious light than any other gym student on the day of the incident. The information found in the record does nothing more than create a mere suspicion and thus does not constitute probable cause.²⁹

May students who are found in a location in which marihuana smoke is detected be subjected to a search simply on the basis of having been found in the area? This is a difficult question which also raises the question of how likely must it be that evidence will be found on a particular student.³⁰ The courts which have applied the probable cause standard are divided. Some courts insist that the odor must be of burning and not merely burned marihuana (if it were merely the smell of burned marihuana it might be the smoke of marihuana smoked earlier by other people).³¹ Other courts place more stress on the nature of the place: the principle seems to be that the more likely it is that innocent people are to be found in the location, the less basis there is for a probable cause finding. The *T.L.O.* standard is intended to be more lenient than the probable cause standard.³²

28. 426 A.2d 432 (1981).

29. *Id.* at 435.

30. *Id.* See text at n. 96.

31. *People v. Hilber*, 269 N.W.2d 159 (Mich. 1978).

32. In *Nelson v. State*, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975) two boys were found near a tractor shed on school grounds where the odor of marihuana was detected. The search

We return now to the question of the canine sniff. Assuming that a canine sniff of a student is a search,³³ the central question is whether students may be sniffed without individualized suspicion that the student is in possession of drugs. We shall return to that question below. Thus, if we assume the student was properly exposed to the dog sniff and the dog alerts, does the alert itself provide reasonable grounds for a more extensive search? The answer would seem to be "yes," if there were proof of the reliability of the particular dog doing the search.³⁴

Sight is the other sense that can come into play in determining reasonable grounds to search. Here also difficult problems arise: not every pill is an illegal substance; not every plastic bag contains marihuana; and cigarette papers are not used only for marihuana. The *T.L.O.* majority seems to have made clear that school officials may assume the worst regarding such items when it said that the discovery of the rolling papers "gave rise to the reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse."³⁵ But this may have been an easy case. Why would T.L.O. have both ready-made cigarettes and rolling papers in her purse? Even as to this easy case Justice Brennan wrote in dissent that the "mere presence without more of such a staple item of commerce is insufficient to warrant a person of reasonable caution in inferring" T.L.O. possessed marihuana.³⁶ Now, what if the purse had been opened, no cigarettes were found but the rolling papers were spotted? The majority seems to suggest that this alone would be sufficient to warrant a further search. There is a sufficiently strong connection between rolling papers and marihuana to warrant a suspicion. But if a student were seen holding a small brown paper bag that seemed to be filled with a soft object, would that by itself provide the basis for a permissible search? At this point we are beyond what *T.L.O.* permits. The evidence for finding reasonable grounds, of course, becomes stronger as we add additional elements—the exchange of money, a furtive gesture, a record of drug violations, etc.

Responses to questions which are evasive, unresponsive, conflicting, or which the school official judges to be implausible and even false would certainly contribute, along with other evidence to a finding of reasonable grounds.

To summarize, the first prong of the *T.L.O.* standard is an objective standard that would allow a search if a hypothetical reasonable school official with expertise in dealing with students, drugs, and other related matters would conclude he or she had reasonable grounds to suspect the

yielded marihuana and a pipe. The court upheld the search on the basis of the "reasonable suspicion" standard.

33. Whether a canine sniff is a "search" within the meaning of the fourth amendment — if it is not, then the fourth amendment standards are not applicable — is a question not clearly settled, and will be briefly discussed below.

34. *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982)(en banc), cert. denied, 103 S. Ct. 3536 (1983).

35. *New Jersey v. T.L.O.*, 105 S. Ct. at 747.

36. *Id.* at 758.

student had relevant evidence on him or herself. The test precludes the baseless and random search, but it does seem to say that search behavior may be guided by a hypothetical school official whose suspicions are easily aroused. This hypothetical person whose behavior we may emulate (we need not be as suspicious and quick to search as our hypothetical school official³⁷) is not naive, but neither is the official a total cynic. The hypothetical official wants to respect the privacy rights of the innocent, but would be willing to invade privacy rights if given some modest reasons to do so. Our hypothetical official would prefer to err somewhat on the side of excessive searching than on the side of insufficient searching. It is better in this hypothetical person's view to search some innocent pupils than to fail to search the guilty. Searching innocent students is considered to be an unfortunate side effect of the effort to maintain order, not a desirable technique for assuring a safe school. A reckless disregard of the privacy interests of students is not a part of the approach of our hypothetical school official.

The Scope of the Search

We turn now to the second prong of the *T.L.O.* test which deals with the scope of a search which was justified at its inception. The Court wrote that "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."³⁸ To analyze this test we divide it into two parts: (1) the requirement that the search be reasonably related to its objectives; and (2) not excessively intrusive. The first part of the test seems to suggest, for example, a strip search for cigarettes would be impermissible because it is unlikely students would sequester cigarettes in their undergarments. A strip search for drugs, however, may be appropriate. Similarly, a strip search for a gun would seem to be unnecessary since a gun could be detected by a patting down of the student and an examination of his or her satchels, purses, backpacks, etc.

The second part of the test is clearly intended to add a number of further qualifications which are not elaborated upon by the Court. The Court indicates the "nature of the infraction" has a bearing on the scope of the search, but what bearing is not spelled out. The most plausible interpretation would seem to be that infractions which do not pose a serious threat to the order of the school or safety of the other students

37. The majority wrote, "Of course, New Jersey may insist on a more demanding standard under its own Constitution or statutes. In that case, its courts would not purport to be applying the Fourth Amendment when they invalidate a search." *New Jersey v. T.L.O.*, 105 S. Ct. at 745 n.10.

38. *New Jersey v. T.L.O.*, 105 S. Ct. at 744.

do not warrant an extensive search such as a strip search.³⁹ Hence, strip searching students to find a few dollars of stolen money would be inappropriate.⁴⁰

The Court also says the age of the student needs to be taken into consideration. Age may be relevant to the scope of a search in several ways. The younger the student, it might be argued, the less likely the student would have the "street-smarts" to sequester contraband in, for example, underwear. The Court may have also been assuming that an intrusive search is more disturbing and upsetting to younger students.⁴¹ The younger student is more vulnerable to and defenseless against sexual abuse.

Last, the Court says the sex of the student needs to be taken into consideration. Assuming only females search females, and males search males, it would seem that of all the considerations listed by the Court, the sex of the student would be one of the least relevant in defining the appropriateness of the scope of the search. Perhaps the Court is making the assumption that female students would be more disturbed than male students over certain kinds of searches.⁴² Or, perhaps the Court is assuming that female students would be more subject and vulnerable to sexual abuse by females searching them.

We might test and expand our understanding of the second prong of the *T.L.O.* test by asking several questions. First, once evidence of drug dealing had been found in T.L.O.'s purse, would a strip search of T.L.O. have been permitted? As suggested above, a strip search to discover cigarettes would not have been permitted, but a more intrusive search might have been warranted once the drug-related items were found in her purse. She was fourteen years old, not an elementary school child, and was involved in a serious infraction of school rules and law. It was possible she had hidden elsewhere on her person other drugs, hence a strip search would have been reasonably related to the object of the search. But it could be argued that once evidence of drug dealing had been found, the school did not need to proceed with a further search. Sufficient evidence was available to impose school discipline on T.L.O., and to have her prosecuted under New Jersey law. In other words, the

39. Note, the majority specifically rejects the notion that the nature of the infraction has a bearing on whether the search is justified at its inception. The nature of the infraction only has a bearing on the scope of the search itself. 83 L.Ed. 2d at 735 n.9.

40. Compare *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977) (in which the court said the strip searching of an entire fifth grade class in a search for \$3 of allegedly stolen money was improper in the absence of facts particularizing which student might have possession of the money).

41. It is an empirical question as to whom the strip search would be more upsetting. The very young may not fully comprehend the situation, view it as a game, and, thus, not be upset. The older student may fully comprehend, and as a consequence be outraged and embarrassed at the same time. But one might also argue that the young would be psychologically more vulnerable and have fewer mental defenses to cope with such an invasion of their privacy.

42. One wonders if the Court is working under an unwarranted stereotype of female students.

question is whether school officials must only do the minimum amount of searching necessary in order to achieve the purposes of maintaining order and safety in the school. The "reasonably related" standard could be interpreted to imply such a limitation.

Now suppose T.L.O. had been discovered in the lavatory engaging in what appeared to be drug dealing instead of smoking a cigarette? Could school officials proceed as follows: begin with a search of her pockets and purse, and finding nothing, proceed to a strip search? The phrasing of the standards in the opinion seems to suggest this would be a permissible course of action.

We can test this conclusion by examining another case. Consider the case of a canine sniff. Assuming all fourth amendment requirements, if any, have been met in exposing the student to the dog, how extensive a search is permitted if the dog alerts? The Seventh Circuit affirmed the conclusion of the district court that the mere fact a dog alerted did not provide warrant for a strip search of a thirteen-year-old girl, but did provide warrant for a pocket search.⁴³ A dog-alert provided "reasonable suspicion" that the student possessed drugs, hence the pocket search was permitted. But the nude search went too far. The district court's opinion placed no stress on the fact that the student was a female and only thirteen, but stressed that canine dogs are reliable insofar as the animal "reacts only to the scent or odor of the marihuana plant, not the substance itself. There is always the possibility that one's clothing may have been inadvertently exposed to the pungent odor of the drug."⁴⁴ In affirming the Seventh Circuit placed more stress on the fact that the student was thirteen; and it called the nude search "a violation of any known principle of human decency," and "outrageous under 'settled indisputable principles of law.'"⁴⁵ All this seems to suggest an additional requirement for strip and nude searches — certitude beyond that provided by the "reasonable grounds" standard that something is hidden beneath the underclothing of the student. We might, thus, conclude under this analysis that a strip search of T.L.O., in the second and hypothetical case, would not have been permissible since a standard stronger than the reasonable grounds standard could not have been met.

The difficulty with this analysis is that the majority opinion provides no hint that it would require something more than the reasonable grounds standard to proceed with an intrusive search. The bifurcated nature of the test opens the door to strip searches of older students reasonably suspected of having evidence on them of a serious school infraction. Thus, in the canine sniff case, the T.L.O. approach would seem to permit a strip search (putting aside the issue of age) if an initial

43. *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980)(en banc), *affirming in part*, 475 F. Supp. 1012 (N.D. Ind. 1979).

44. 475 F. Supp. at 1024.

45. 631 F.2d at 93.

search of pockets, purses, etc. turned up nothing and the dog continued to alert.

This is a disturbing conclusion. If dog sniffs are not searches within the meaning of the fourth amendment, all high school students could be subjected to the sniffing of a dog, and upon the alerting of the dog, strip searched.⁴⁶ Indeed, any high school student reasonably suspected of concealing drugs or other evidence of drug dealing on their persons — take the case of a student who has been informed upon by another student — could be subjected to a strip search, especially if evidence were not found in their pockets, purses, bookbags, etc. A past history of having brought a knife into school and a furtive gesture, under this interpretation of *T.L.O.*, opens the door to a strip search. In short, *T.L.O.* appears to invite extensive strip searching in American high schools. Whether school officials will in fact exploit the leeway provided by *T.L.O.* is another question. There is reason to suspect that most school officials will be reluctant to engage in extensive strip-searching of their pupils.

Other Issues

Space does not permit a full exploration of a number of important issues not settled by *T.L.O.* but mention of them is warranted to round out the picture. First, do the *T.L.O.* standards apply to the search of student lockers? The Court in *T.L.O.* did not answer this question but said the answer turned on "whether a schoolchild has a legitimate expectation of privacy in lockers, desks or other school property provided for the storage of school supplies."⁴⁷ Suffice it to say that a majority of the lower courts to date have adopted the view that, since lockers are jointly controlled by the student and the school, the student does not have a reasonable expectation of privacy as to the locker.⁴⁸ Second, are sniffs by dogs a "search" within the meaning of the fourth amendment? Though it seems likely most courts would today agree that the sniff of a locker is not a search,⁴⁹ authority is split as to whether the

46. If a dog-sniff is a search, the student could only be sniffed if there were reasonable grounds to believe he or she had drugs in his or her possession. If the dog alerted, that fact plus the information that led to the sniffing in the first place would seem clearly to provide a basis for a strip search of a high school student.

47. *New Jersey v. T.L.O.*, 105 S. Ct. at 741 n.5.

48. *Zamora v. Pomery*, 639 F.2d 662 (10th Cir. 1981); *People v. Overton*, 249 N.E.2d 366 (N.Y. 1969); *State v. Stein*, 456 P.2d 1 (Kan. 1969). *Contra State ex rel. T.L.O. v. Engerud*, 463 A.2d 934, 943 (N.J. 1983) *reversed on other grounds*, 105 S. Ct. 733 (1985). In *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982)(en banc), *cert. denied*, 103 S. Ct. 3536 (1983) the issue arose as to whether the use of dogs to detect illegal contraband in lockers and persons were searches. The court concluded that the sniffing of lockers was not a search but sniffing students was. The court reasoned that sniffing lockers would not cause students the kind of embarrassment sniffing their bodies would.

49. The Supreme Court has held that the sniffing of luggage is not a search. *United States v. Place*, 103 S. Ct. 2637 (1983). In *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982)(en banc), *cert. denied*, 103 S. Ct. 3536 (1983); the court held that the use of dogs to sniff lockers was not a search, but their use in sniffing students was.

sniff of a student would be viewed as a "search."⁵⁰

Are there circumstances in which searches may proceed in the absence of individualized suspicion that a particular student has evidence of a violation of a school rule or law on his or her person? The Court in *T.L.O.* specifically left this question open.⁵¹ Thus we have no answer as to whether an airport style search for weapons of all students entering the school would be permissible. We can speculate, however, that in the special case of a school facing serious weapons problems that an airport style search would be upheld because the degree of invasion of privacy is minimal; because there is no detention; the search does not impose a stigma; it does not annoy, frighten or humiliate; and the need for the search is significant.⁵² A dog sniff of all students can be more intrusive, embarrassing, and can involve the detention of students, hence, if it is a search, might not be allowed. Requiring drug tests of all students is even less likely to be upheld because such tests are even more intrusive, and potentially embarrassing.

Does the higher probable cause standard apply if the police are in any way involved in a school search?⁵³ A plausible and reasonable answer would seem to be that the search should only be deemed a "police search" if the police initiate the search process, and actually arrive at the school to oversee and participate in the search by, for example, observing what school officials do in a quest for evidence relevant to a criminal or quasi-criminal prosecution. Several courts seem to have adopted a rule of this sort.⁵⁴ But other courts have said that a search remains a "school-official search" even though the police initiated and were involved in the search.⁵⁵

The issue of when, as a matter of law, it can be concluded that a student has voluntarily given his or her consent to a search remains a relatively unexplored area of the law.⁵⁶

50. The lower courts are split on the question of whether sniffing students is a search. Two courts have held that it is not a search. *Zamora v. Pomery*, 639 F.2d 662 (10th Cir. 1981); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981). Two other courts have held that it is a search. *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982)(en banc), *cert. denied*, 103 S. Ct. 3536 (1983); *Jones v. Latexo Indep. School Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980).

51. *New Jersey v. T.L.O.*, 105 S. Ct. 733, 744 n.8 (1985).

52. See *United States v. Albarado*, 495 F.2d 799 (2nd Cir. 1974); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

53. The lower courts have assumed that the police in searching students must abide by the probable cause standard. See *State v. McKinnon*, 558 P.2d 781 (Wash. 1977)(en banc); *Piazzola v. Watkins*, 316 F. Supp. 624 (M.D. Ala. 1970), *aff'd*, 422 F.2d 284 (5th Cir. 1971).

54. *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984) *cert. denied*, 105 S. Ct. 1749 (1985); *Martens v. Dist. No. 220, Board of Educ.*, 620 F. Supp. 29 (N.D. Ill. 1985); *State v. McKinnon*, 558 P.2d 781 (Wash. 1977)(en banc).

55. See *People v. Overton*, 249 N.E.2d 366 (N.Y. 1969); *Zamora v. Pomery*, 639 F.2d 662 (10th Cir. 1981). Compare *Picha v. Wieglos*, 410 F. Supp. 1214 (N.D. Ill. 1976).

56. Compare *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984) *cert. denied*, 105 S. Ct. 1749 (1985); *State v. Feazell*, 360 So. 2d 907 (La. Ct. App. 1978); *State v. Wingerd*, 318 N.E.2d 866 (Ohio Ct. App. 1974); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

Last, we turn to the exclusionary rule.⁵⁷ A majority of the lower courts have rejected the applicability of the exclusionary rule in school disciplinary hearings.⁵⁸ The courts are also split as to the use of the exclusionary rule to exclude evidence from a criminal proceed which had been illegally seized by school officials.⁵⁹ Apparently only one case has held that the exclusionary rule does serve to exclude evidence which had been illegally seized by the police from a school disciplinary proceeding.⁶⁰ There seems little doubt the rule would be used in connection with police searches leading to evidence used in a criminal prosecution.⁶¹

57. The exclusionary rule as applied to searches by police of adults says that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state and federal courts. *Mapp. v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

Since the search in *T.L.O.* was found to be legal, the Court did not reach the question of the applicability of the exclusionary rule as regards school searches.

58. *Rejecting use of the rule: Morale v. Grigel*, 422 F. Supp. 988, 999-1001 (D.N.H. 1976); *Speake v. Grantham*, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971); *Keene v. Rogers*, 316 F. Supp. 217 (D. Me. 1970); *Gordon v. Santa Ana Unified School Dist.*, 208 Cal. Rptr. 657 (Cal. Ct. App. 1984). *Applying the exclusionary rule: Jones v. Latexo Indep. School Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980); *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975).

59. *Applying the exclusionary rule: State ex. rel. T.L.O.*, 463 A.2d 934 (N.J. 1983), *reversed on other grounds, New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985); *People v. Scott D.*, 315 N.E.2d 466, (N.Y. 1974). *Rejecting the exclusionary rule: State v. Young*, 216 S.E.2d 586 (Ga. 1975), *cert. denied*, 423 U.S. 1039 (1975)(dictum).

60. *Caldwell v. Cannady*, 340 F. Supp. 835 (N.D. Tex. 1972).

61. *Mapp. v. Ohio*, 367 U.S. 643 (1961).

12

Objective Testing to Assess Teacher Competency: Emerging Legal Issues

Joseph C. Beckham

Local school districts and state education agencies who adopt standardized examinations as a measure for determining teacher competency must be alert to an array of legal constraints applicable to the use of these devices. State mandates for teacher competency testing as a basis for certification have been judicially upheld where the test focused on minimum standards of literacy and knowledge within a particular discipline or educational field. However, use of standardized testing as a basis for recertification, promotion, renewal, career ladder or merit pay involves an extension of teacher competency testing into the area of performance evaluation. In these instances, other performance appraisal indices may contradict or conflict with test results, forcing heightened judicial scrutiny of the use of teacher competency tests.

Legal Challenges to Competency Testing

Education agencies who utilize standardized testing because of its objective and quantifiable results may be confronted with complaints that the tests promote bias and fail to measure teacher competence. When test results serve as a basis for employment decision-making, these tests may deny due process or equal protection under the fourteenth amendment or violate federal anti-discrimination statutes.¹ Whether the school district or state department of education elects to use existing tests, such as the National Teacher's Examination (NTE), or to construct a "customized" examination, specification of the intended purpose for the test and elaboration and implementation of a validation strategy to realize that purpose are critical dimensions in withstanding legal challenge.

1. See Lines, *Teacher Competency Testing: A Review of Legal Considerations*, 17 West's Educ. L. Rep. 811 and Strassle, *Minimum Competency Testing of Teachers for Certification: Due Process, Equal Protection and Title VII Implications*, 70 Cornell L. Rev. 494 (1985).

Rational Basis

In development and implementation of any competency testing procedure a school district or state agency must be able to establish that the classification scheme is reasonable and rationally related to a valid state purpose. For example, in *Armstead v. Starkville Municipal Separate School District*,² the Fifth Circuit Court of Appeals dealt with a situation in which a Mississippi school district required incumbent teachers and future applicants to achieve a minimum score on the Graduate Record Examination (GRE). No validation tests or studies had been undertaken by the school district to establish that this test was reasonably related to the purpose for which it was used. The Fifth Circuit stated that it did not need to consider the issue of racial discrimination because the use of the GRE was unconstitutional under a limited equal protection analysis. The court concluded that the classification was not reasonably related to the purpose for which it was used, stating:

We agree with the lower court's finding that the GRE score requirement was not a reliable or valid measure for choosing good teachers. It was undisputed that the GRE was not designed to and could not measure the competency of a teacher or even indicate future teacher effectiveness. However, it was established that the cutoff score would eliminate some good teachers. Consequently, we find that it has no reasonable function in the teacher selection process.³

Armstead was cited as guiding precedent by a federal district court in *Georgia Association of Educators v. Niz*.⁴ *Niz* centered on one aspect of teacher certification established by the Georgia State Board of Education which required use of a minimum NTE score as an alternative requirement for the "T-6" six-year certificate, one of the highest certification levels in the system. Despite the fact that no empirical research had been undertaken to establish that the minimum score was valid for the purpose, the board stipulated two objectives of the policy:

To insure that the teacher achieving a six-year certificate has, in fact, gained valuable new knowledge as a result of his extra education; and as a device to recognize a superior or "master teacher" who should be rewarded with a higher salary level.⁵

The district court declined to rule on the racially discriminatory nature of the NTE minimum score standard, and held that the use of the NTE in the six-year certification process violated equal protection because the classification requirement could not be shown to rationally relate to the purpose for which it was intended. The court noted that no

2. 461 F.2d 276 (5th Cir. 1972).

3. *Id.* at 280.

4. 407 F. Supp. 1102 (N.D. Ga. 1976).

5. *Id.* at 431.

evidence had been offered which would establish that the use of the NTE furthered the purposes articulated in the "T-6" certification objectives. Although the record disclosed that the NTE was designed for recent college graduates to measure knowledge gained in undergraduate school, the court concluded that the NTE had not been shown to correlate with the knowledge one might achieve in completing the proposed alternative six-year certification requirement (completion of doctoral level coursework in education) or that the NTE requirement assessed learning in postgraduate courses. Consequently, use of the NTE for advanced level certification was held to be an arbitrary classification scheme.⁶

Strict Scrutiny

The United States Supreme Court has noted that the discriminatory impact of an employment test must be traced to a racially discriminatory purpose before the heightened scrutiny standards of the equal protection clause will apply.⁷ A showing of adverse racial impact in the use of an objective test would not make out a case of discrimination in the absence of proof of discriminatory intent, nor would the equal protection clause prohibit an education agency from seeking to upgrade the communicative abilities or knowledge level of school employees, where those employees are clearly in jobs that require special abilities to communicate orally and in writing. If the employment test is neutral on its face and rationally related to a valid state purpose, then its adverse consequences for a particular minority group would not be an issue under constitutional standards of equal protection. The notion that an allegation of racial discrimination violative of equal protection must be linked to a racially discriminatory purpose on the part of the state was applied in the context of teacher competency testing when the United States challenged a state's use of NTE scores for the purpose of awarding teacher certification and determining salary compensation. In *United States v. South Carolina*,⁸ South Carolina was charged with violating equal protection of the laws under the fourteenth amendment because proportionately more black than white candidates for teacher certification failed to achieve minimum scores on the NTE. The test had been adopted in South Carolina on the basis that it was objectively scored and provided a content validated measure of the extent to which prospective teachers had mastered the subject matter of accredited teacher training programs. Use of the NTE resulted in substantially greater proportions of blacks than whites being excluded from state certification and salary subsidies.

In considering the fourteenth amendment equal protection challenge, a three-judge federal district court upheld the use of the NTE, stating

6. *Id.* at 431-432.

7. *Washington v. Davis*, 426 U.S. 229 (1976).

8. 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).

that South Carolina's "use of the NTE for both certification and pay purposes meets the rational relationship standard ... and consequently does not violate the equal protection clause of the fourteenth amendment."⁹ The district court held that South Carolina had the authority to define minimal competence and found that plaintiffs did not demonstrate the required discriminatory intent with respect to the use of the NTE scores for setting certification standards. As to use of the NTE for salary purposes, the court noted that classifications of teachers' certificates, based in part on NTE scores, were used by the state to determine the amount of state aid to be allotted to school districts. Although the state aid schedule provided fewer benefits and incentives for classifications which contained proportionately more black than white teachers, the court again found no direct evidence of an intent to discriminate.

In a case decided on similar equal protection grounds, *Moore v. Tangipahoa Parish School District*,¹⁰ a black teacher, terminated for refusing to take the NTE, challenged use of the examination as an evaluative tool in desegregation-related staff reductions. The teacher contended that the adoption of an NTE score requirement as a condition of re-employment was racially motivated. The Fifth Circuit Court of Appeals noted that adoption of the NTE requirement would be impermissible when shown to be motivated by a discriminatory purpose, but declined to overrule a determination that use of the NTE was objective and the teacher's termination for refusal to take the test did not violate equal protection. Citing *United States v. South Carolina*, the court held that the use of NTE scores in evaluating teachers is permissible in the absence of a showing that adoption of the NTE requirement was motivated by a discriminatory purpose.¹¹

The use of *United States v. South Carolina* as a precedent in resolving *Moore*, extends the logic of that decision from a situation involving the certification of prospective teachers to one in which a teacher's renewal is at stake. In *United States v. South Carolina*, the rational relationship between the state's legitimate objective of providing an incentive for professional improvement and the use of the NTE for determining salary levels was upheld because "teachers without adequate knowledge to teach effectively will upgrade their capability."¹² With respect to the use of the NTE for certification, the court found that mere graduation from an accredited training institution, an alternative with less disparate impact on blacks, would not "achieve the state's purpose in certifying minimally competent persons equally well as the use of a content-validated standardized test."¹³ The three-judge federal district court examined the content-validity of the test only insofar as it compared with the curriculum of South Carolina's teacher training institu-

9. *Id.* at 1100-1102.

10. 594 F.2d 489 (5th Cir. 1979).

11. *Id.* at 37.

12. 445 F. Supp. at 1116.

13. *Id.* at 1115-1116.

tions. *Moore* is unique because the federal court ignored the issue of NTE validity relative to the teacher's actual job performance, a central question because the employment decision involved re-employment rather than initial certification.

Disparate Impact

The principal federal statutory limitation on teacher competency testing involves the disparate impact provision of title VII of the Civil Rights Act of 1964.¹⁴ The United States Supreme Court has emphasized that the disparate impact provisions of title VII focus on employment practices that appear to be fair in form, but which have a discriminatory consequence.¹⁵ Where plaintiffs contend that the effect of a test requirement is to exclude a disproportionate number of an identifiable minority from employment, title VII would be invoked to compel an employer to establish that the requirement bears a demonstrable relationship to successful job performance.¹⁶ The High Court has summarized its view of title VII by saying, "Nothing in the Act precludes the use of testing or measuring procedures; ... What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."¹⁷

Title VII cases emphasize that there must first be a showing that the competency examination has an adverse impact on the employment opportunities of members of an identifiable sex, race or ethnic group.¹⁸ Once it is established that the impact or consequence of the testing program or selection criteria is discriminatory in effect, judicial injury will force the employer to justify the requirement as having a manifest relation to the proposed employment.¹⁹ The employer will thus bear the evidentiary burden of demonstrating the validity of the employment practice whether the practice relates to certification, selection, retention, or termination.

The validation strategy utilized in *United States v. South Carolina*²⁰ illustrates the applicable standards of title VII relative to teacher certification examinations. The district court reviewed a content validity study which was asserted to justify the continued use of the NTE for

14. 42 U.S.C. § 2000e (1982).

15. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

16. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

17. 401 U.S. at 436.

18. See *Albemarle Paper Co.*, 422 U.S. at 425 n.n.15-17, 19.

19. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court focused on job-relatedness without mentioning a requirement of business necessity. In *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977), however, the Court stated that a challenged selection standard must be "necessary to safe and efficient job performance." Later, in *New York Transit Auth. v. Beazer*, 440 U.S. 568 (1979), the Court indicated that proof of strict necessity is not necessary as long as the selection standard bears a "manifest relationship to the employment in question." *Id.* at 587 n.31 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

20. 445 F. Supp. 1094.

teacher certification and salary level determination under state guidelines. The study was based upon the judgments of two panels of teacher-educators drawn from South Carolina's twenty-five teacher-training institutions. A "content review" panel was asked to decide whether each question on the tests involved subject-matter that was a part of the curriculum of South Carolina's teacher-training institutions, and a "minimum score" panel was requested to estimate the percentage of minimally qualified applicants who would answer each question correctly. Only test questions that had been determined by a majority of the content review panel to be content valid for use in South Carolina were used in making the minimum score estimates. After receiving the recommended minimum scores, the South Carolina State Board of Education considered a variety of factors (e.g., standard error of measurement, sampling error, reliability) in determining to lower the recommended minimum scores for each test by one, two or three standard errors of measurement.

In meeting its burden to show that reliance upon the certification examination met the "business necessity" test of title VII, South Carolina was able to convince the court that the validation strategy developed for use of the NTE insured that the test would not create an artificial, arbitrary or discriminatory barrier to those denied certification or salary supplements. The court presumed that training program validation was sufficient aside from the possible relationship between the test and actual job performance.²¹

In a case which takes the reasoning of *United States v. South Carolina* a step further, the Fourth Circuit Court of Appeals held the use of the NTE for the purpose of granting teacher pay raises to be justified in order to improve the ability of the school district to attract the best qualified teachers and to encourage district teachers to supplement their study and improve their knowledge of those teaching skills which the NTE validity evaluated.²² The school board policy had a disproportionate impact on black teachers, denying pay raises to 2% of white teachers and 38.6% of black teachers within the district.

In this case, the federal appeals court made no distinction between pay raises for teachers who achieved high scores on the NTE and the award of a salary supplement to teachers who met certification requirements based on NTE minimum scores. Both objectives, the court concluded, were intended to improve the quality of teaching. If the NTE could be used to create salary differentials between certified and uncertified teachers, as in *United States v. South Carolina*, it could appropriately be used to create salary differentials among certified teachers with different scores on the examination.²³

21. See *Washington v. Davis*, 426 U.S. 229 (1976) for a case in which the Court accepted the use of a test as a screening device for police recruits who sought admission to a training program.

22. *Newman v. Crews*, 651 F.2d 222 (4th Cir. 1981).

23. *Id.* at 225.

The circuit court's opinion also considered a contention that the use of a teacher performance evaluation system provided an alternative to the use of test scores and would achieve the business purpose of improving the quality of teaching with a less harsh discriminatory effect. While the court granted that such a performance evaluation system might be useful in identifying areas for teacher improvement, it took notice of the fact that the existing evaluation system was subjective and inexact and concluded there was no reason to suppose such a system would not involve substantial potential for discrimination, particularly when compared with what the court described as the "complete objectivity" of the NTE.²⁴

Not all cases involving the use of NTE in employee evaluation have justified reliance on the test. An Alabama school board, acting on the recommendation of a study commission, adopted a policy that a minimum score on the NTE was necessary for employment of new applicants and re-employment of annual contract teachers. During the four-year period in which this requirement, or a limited modification thereof, was applicable to teachers in Mobile County, Alabama, the school system had a black teacher population of between 36% and 39%. For the same period, seventy-seven nontenured teachers were not re-employed solely because they failed to meet the minimum score requirement. Fifty-one of these teachers were black, representing 66% to 67% of the total not re-employed.

In a title VII claim for a preliminary injunction prohibiting implementation of the policy, a federal district court was asked to determine if there was sufficient likelihood of success on the merits or potential irreparable harm to the non-renewed teachers to justify a preliminary injunction prohibiting the use of the test. The district court granted the injunction against use of the test on the basis that the minimum score requirement may well constitute an artificial, arbitrary barrier to employment that would operate invidiously to discriminate on the basis of race.²⁵

In reaching this conclusion, the court took note of the NTE's unvarying history of adverse racial impact and the disclaimers within the NTE's guidelines which discourage use of the test with arbitrary cut-off scores. Since the school district was utilizing a cut-off score on the NTE as an employment selection device without prior investigation of its probable consequence, the court was of the opinion that there was an increased likelihood that the board was misusing the examination in a way that would adversely affect black teachers in the system.²⁶

The Alabama school board's failure to follow the admonitions of the testing service in using test results and adopting a minimum cut-off score were the critical factors in the federal district court's decision to

24. *Id.*

25. *York v. Alabama State Bd. of Educ.*, 581 F. Supp. 779 (M.D. Ala. 1984).

26. *Id.*

award a preliminary injunction.²⁷ Regrettably, the court did not address the fact that the black teachers within the class affected by the policy had been evaluated and recommended for renewal by their respective principals. As the testing service specifically asserted in its guidelines for use of the test,

[t]he NTE measures academic preparation for teaching, not the act of teaching itself; and the critical criterion in evaluating an inservice teacher is not potential but actual teaching performance. If an adequate and reliable record of a teacher's inservice performance is available, that record should be used.²⁸

Due Process

Although courts have not addressed due process claims in the context of teacher competency testing, *Debra P. v. Turlington*²⁹ is an analogous case which considers the due process argument in the context of student competency testing. In *Debra P.*, both the district court and the court of appeals found that withholding high school diplomas from students who failed a minimum competency test constituted denial of due process. The district court held that the students' legitimate expectation that satisfactory attendance and completion of required courses would result in the receipt of a diploma created a constitutionally protected property interest.³⁰ The district court also found that students had a constitutionally protected liberty interest in being free of the stigma associated with failure to earn a high school diploma.³¹ The court of appeals based its decision that the test violated due process upon the finding of a property right alone.³²

Federal courts are unlikely to find that graduates of teacher training programs have a protected property interest in teacher certification. However, the use of teacher competency testing in the context of recertification, contract renewal or the award of job benefits may offer a basis for establishing a legitimate claim of entitlement to continuing employment. Individuals in these latter categories may assert a genuine entitlement to employment that may rise to the level of a property right protected under due process of law.³³

While it is unlikely that a court would recognize a stigma of sufficient magnitude to invoke constitutional due process protections for employ-

27. *Id.* at 783-786. In particular, the court noted that the school district had adopted percentile ranks as cut-off standards and failed to investigate the probable discriminatory consequences of the cut-off score prior to implementation.

28. 581 F. Supp. at 781.

29. 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated and remanded in part*, 644 F.2d 397, *reh'g denied*, 654 F.2d 1079 (5th Cir. 1981).

30. *Id.*

31. *Id.* at 266.

32. 644 F.2d at 404.

33. See *Board of Regents v. Roth*, 408 U.S. 564 (1972). In the *Roth* case, a nontenured teacher was not re-employed subsequent to a one-year contract, and was not given the same procedural protection applicable to tenured teachers under Wisconsin law.

ees who fail to meet minimum score requirements on an objective test, employees who are adversely affected by a competency test may successfully allege the denial of a property right to continued employment. Particularly in those cases in which the adversely affected employee has been evaluated as having performed satisfactorily, the expectancy of continued employment may be sufficiently cognizable to warrant a judicial determination that a property right is involved.³⁴

However, even if the employee established the existence of a constitutionally protected liberty or property right, education agencies can effectively counter by showing that they have provided adequate notice of the test requirements. The *Debra P.* court viewed adequate notice to require setting the effective date of new testing requirements far enough in advance to permit adequate student preparation.³⁵ In the context of teacher competency testing, agencies may avoid due process objections by forewarning employees about test requirements so as to enable employees to prepare for the exam.

In addition to adequate notice of requirements if a constitutional liberty or property interest is at stake, the fifth circuit recognized that students must receive fundamentally fair treatment before being denied a diploma.³⁶ Fairness in this context depends on "curricular validity," which required testing on materials actually taught.³⁷ However, if teacher tests purport to measure an applicant's competency for a particular job, then courts may demand validation in terms of job-relatedness, consistent with the more rigorous regulatory validation requirements under title VII of the Civil Rights Act of 1964.³⁸

Testing Applications and Limitations

The most often utilized "ready made" objective test is the National Teacher's Examination (NTE), constructed by Educational Testing Service (ETS). When NTE tests are used by school districts, ETS provides guidelines which state:

The current NTE tests were developed to provide information about candidates' academic knowledge and skills, typically acquired through a teacher-training program. They do not provide a direct evaluation of teaching performance. For this reason, NTE tests should not be used by school districts, directly or indirectly, to determine the compensa-

34. See *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Sindermann*, the Court held that a professor, with several years of satisfactory teaching at an institution lacking a formalized tenure system, may nevertheless have a reasonable expectancy of continued employment entitling him to adequate due process protections prior to any termination of employment.

35. 474 F. Supp. at 266.

36. 644 F.2d at 404.

37. *Id.* at 405.

38. See 29 C.F.R. §1607.1-.16 (1984). Although the guidelines lack the force of law, the Supreme Court has accorded them varying degrees of deference as the enforcing agencies' interpretation of title VII. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430-36 (1975) and *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

tion, retention, termination, advancement, pay supplements, or change in provisional employment status of teachers once they are employed. Such decisions about teachers in service should be based on teaching competencies as determined directly by the supervisory and evaluation procedures of the employing school district.

The current NTE tests measure knowledge and skills needed by the beginning teacher; more is required of the teacher in service. . . . If current NTE tests are to be used as part of a program of continuing professional education, they should not be used, either directly or indirectly, for determining the compensation, retention, termination, advancement, pay supplements, or change in provisional employment status of teachers once they are employed.³⁹

The explicit limitations for NTE utilization established by ETS may encourage the development of in-house objective tests by state education agencies, but the costs of development and validation may be prohibitive for local school districts. Even in-house tests are unlikely to meet the rigorous validation standards adopted by the Equal Employment Opportunity Commission under the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines).⁴⁰ As a consequence, the extent to which a public education agency or local school district can rely on objective test results in making employment decisions will depend on the burden of proof imposed by judges in determining whether a competency test is sufficiently job-related to justify its discriminatory effect.

Test validation is the method for establishing the job-relatedness of employment tests. Judicial standards for validation must ultimately delineate the employer's burden in validating a challenged selection process and can influence test use through the costs associated with a particular validation strategy.⁴¹

Judicial reluctance to apply the stringent validation requirements suggested by the Uniform Guidelines would appear to simplify a state education agency or school district's burden to show the job-relatedness of a challenged employment selection standard. If federal courts continue to accept a standard of curricular validity, measuring the correspondence between materials tested and materials taught, validation of teacher competency tests without reference to successful performance on the job will significantly reduce the employer's burden to demonstrate the job-relatedness of the test. However, it is not clear whether the employer's burden to justify the job-relatedness of a particular test might depend on the nature of the employment decision involved.

39. Educational Testing Service, *Guidelines for Proper Use of NTE Tests* 7 (1983).

40. 29 C.F.R. § 1607 (1984).

41. See 41 C.F.R. § 60.3.5A (1983) for validation options under the Uniform Guidelines.

Certification

Use of objective testing as a prerequisite to professional certification appears legally permissible when the validation strategy emphasizes knowledge reasonably related to that which is taught in the educator's professional training program. While such a certification criterion would be legally sufficient wholly aside from the possible relationship between the test and actual job performance, its use is justified on the basis that school boards and state education agencies may insist upon a minimum level of knowledge related to academic preparation for teaching.

In *United States v. South Carolina*, the federal court acknowledged that the state's validation study measured the test's correspondence with the content of academic teacher training programs rather than its ability to predict job performance, and upheld the strategy.⁴²

The use of a teacher competency examination for purposes of recertification at periodic intervals could be justified as a circumstance analogous to *United States v. South Carolina*. The state's power to regulate by examination clearly applies to entry into the teaching profession, thus continued assessment of the teacher's knowledge of subject matter relevant to teaching would appear to be justified. As certification is regarded as a property right once it is vested, recertification guidelines should include due process protections such as timely notice of requirements, remediation for those who fail to meet the minimum acceptable score, and opportunities for examination retakes.

Salary Award and Merit Pay

The opinion in *United States v. South Carolina* upheld the use of minimum score requirements for determining teacher salary levels, based upon evidence showing a rational relationship between test use and the state's legitimate objective of providing an incentive for professional improvement, encouraging teachers without adequate knowledge of education or related specialized fields to upgrade that knowledge.⁴³ While salary supplements to test certified as opposed to noncertified teachers might rest exclusively upon an objective score requirement, it is questionable at what point a court would intervene when salary discriminations between certified teachers are predicated exclusively upon differences in test scores. Furthermore, where other indicators are available as discriminators of teacher performance, discontinuities between those indicators and test results may lead to judicial review of a salary supplement or merit pay system which has a disparate impact on a minority.

Setting cut-off scores at discrete intervals in order to award teachers salary supplements is subject to attack on the basis that the cut-off

42. 445 F. Supp at 1094.

43. *Id.*

44. 400 F. Supp. 343 (E.D.N.C. 1975), *vacated*, 425 F. Supp. 789 (E.D.N.C. 1977).

scores are not validated in relation to teacher performance standards. Not only would the approach be inconsistent with the use of objective tests proposed by ETS, but the issue of examination validity could be compounded by judicial review of the method for adopting the discrete intervals utilized as a basis for salary awards. In *United States v. North Carolina*, a federal district court issued an injunction against use of the NTE for teacher certification purposes because the NTE cut-off score requirement was set without consideration of its implications for selecting teachers for hiring. In this case, and in *York v. Alabama State Board of Education*,⁴⁵ the failure of school boards to consider the admonitions of ETS against adoption of a cut-off score without careful investigation and validation in relation to teacher performance standards was a determining factor in awarding preliminary injunctions against use of the test.

Adverse Employment Decisions

The United States Supreme Court has recognized the authority of a school board to enforce a state-mandated continuing education requirement, holding that nonrenewal of contract, when imposed uniformly on those teachers who refused to comply with the requirement, was rationally related to a valid state purpose.⁴⁶ Use of a standardized test to assess compliance with a state-mandated or board adopted continuing education requirement would appear to meet the rational basis test, provided the test was a valid measure of continuing education subject matter.

However, the use of minimum scores on standardized tests as the sole criterion for adverse employment decisions affecting inservice teachers would certainly be subject to heightened judicial scrutiny upon a showing of disparate impact under title VII. It is possible federal courts would vary from the application of curricular validation standards for the use of objective tests by compelling a school district to present evidence of a correlation between test results and job performance in order to justify use of the test in situations involving dismissal, nonrenewal, demotion or similar adverse employment decisions. Since testing services encourage reliance upon multiple measures in evaluating employees and other measures of employee performance are available, often mandated by state or local policy, exclusive reliance upon test results would seem suspect, particularly where the validation strategy is limited to curricular validity.

Wholly apart from the issue of test validation, a court could find evidence of performance appraisal, particularly classroom evaluation, so in conflict with test results as to effectively contradict a school board's claim that reliance on test results constitutes a business neces-

45. 581 F. Supp. 779 (M.D. Ala. 1984).

46. *Harrah Indep. School Dist. v. Martin*, 440 U.S. 194 (1979).

sity within the meaning of title VII. In *Albemarle Paper Co. v. Moody*,⁴⁷ the United States Supreme Court noted that even upon a showing of job-relatedness, a plaintiff may show that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" While courts are reluctant to impose a judgment as to the suitability of alternatives, a school district or state agency which has adopted a performance appraisal system would be vulnerable if it chose to rely solely on competency examinations and ignored conflicting evidence produced from direct observation of teacher performance. Even though the latter appraisals may be characterized as subjective, their adoption and use by the education agency would permit judicial recognition that a suitable alternative means for assessing teacher competency is available.⁴⁸

Adverse employment decisions often implicate property rights that compel due process protections for the employee. As in other applications of teacher competency testing, timely notice, coupled with opportunities for remediation and retesting are integral, particularly for tenured or continuing contract teachers.

Conclusions

Use of nationally standardized tests as a basis for determining teacher competency has been and will continue to be a subject for judicial review in both state and federal courts. State and local school district policies requiring competency testing of teachers have advanced the use of minimum score requirements as a basis for employment decisions relative to certification, hiring, renewal, promotion and merit pay. Legal challenges to these policies focus upon the constitutional guarantees of due process and equal protection as well as on the "disparate impact" provisions of title VII of the Civil Rights Act of 1964.

The extent to which local school districts or state education agencies may rely upon competency testing in setting education policy related to teaching is uncertain. As techniques for assessing teacher performance continue to be developed and implemented in public schools, reliance upon objective test scores as a principal determinant in employment decision-making may be limited to instances in which no other evaluative information on job performance is available. As a criterion for certification, a guide to the initial hiring decision or as one of several factors in determining salary subsidy or promotion, a strong legal basis for the minimum competency testing of teachers or prospective

47. 422 U.S. 405 (1975); *accord* *Connecticut v. Teal*, 457 U.S. 440 at 447 (1982).

48. *But see* *Newman v. Crews*, 651 F.2d 222 at 225 (4th Cir. 1981). While the court granted that a performance evaluation system might be useful in identifying areas for teacher improvement, it took notice of the fact that the existing evaluation system was subjective and inexact and concluded there was no reason to suppose such a system would not involve substantial potential for discrimination, particularly when compared with what the court described as the "complete objectivity" of the NTE.

teachers has evolved. The use of a minimum competency test as the sole criterion in undertaking adverse employment decisions, setting discrete salary differentials or standards for merit pay is, however, a suspect practice which will compel judicial scrutiny particularly where discriminatory practice is at issue.

Plaintiffs who challenge teacher competency testing requirements must overcome formidable obstacles in asserting a property interest worthy of due process protection or establishing an employer's discriminatory intent as a predicate for strict judicial scrutiny. Uncertain validation standards and ambiguities in the shifting burden of proof under title VII create additional impediments. However, the uncertainty of predicting outcomes involving legal challenges to various forms of teacher competency testing, coupled with the likelihood that teacher's unions and civil rights groups will specifically target teacher competency testing in situations other than certification, increases the prospect for legal challenges.

School boards and state agencies must take extreme care to draft testing policies which correspond to appropriate educational objectives and reflect approved validation strategies. Efforts to eliminate racial and cultural bias in test items and to set minimum score requirements that are fair and equitable must be documented. Gradual phase-in of testing requirements and pilot-testing, coupled with timely notice of test objectives, subject matter coverage and intended use should be incorporated in policy implementation. Finally, applicants and employees should be advised of areas in which deficiencies are identified and provided with opportunities for reexamination. Remedial assistance to employees who fail to meet score requirements may also be warranted.

In the context of litigation involving teacher competency testing, settlement options should not be ignored. Despite reluctance to intervene in educational policy-making, judges often demonstrate heightened sensitivity to employment issues, particularly in instances in which cross-cutting social issues such as discrimination are implicated. In these cases, judicial uncertainty about appropriate validation standards and the shifting burden of proof involving disparate impact make for potentially complex, fact intensive and costly litigation. Often, an agreement between the parties can be negotiated which will permit use of the competency examination as a factor in employment decision-making while providing safeguards insuring fair and equitable treatment of the employee.⁴⁹

49. See *Allen v. Alabama State Bd. of Educ.*, 612 F. Supp. 1046 (S.D. Ala. 1985). Settlement agreement charged a three-person panel with monitoring and overseeing the test development process and created panels of black educators to review examinations for potential bias and make recommendations to the state board.

13

Home Instruction: Two Views

Part I. Neil Devins
Part II. Perry A. Zirkel

Part I State Regulation of Home Instruction: A Constitutional Perspective¹

Neil Devins

How compelling is a state's interest in ensuring that its young receive an adequate education? Does this interest in an adequate education extend beyond reading, writing, and computation to socialization? And how does this interest compare with a parent's right to direct the educational and religious upbringing of his children? These fundamental questions are raised in lawsuits challenging state efforts either to prohibit or severely limit "home instruction."

Increasingly, parents are going to court to challenge restrictive state educational procedures on both statutory and constitutional grounds. On constitutional grounds, parents claim that these procedures deprive them of their fundamental right, protected by the due process clause of the fourteenth amendment and the free exercise clause of the first amendment, to direct the upbringing of their children. On statutory grounds, parents argue that their home study program satisfies vague "equivalency with public schools" statutes, or that their home should be viewed as a private school for purposes of state compulsory education laws.

These parents usually recognize that the state has authority to demand that its young attain minimum academic competency in a basic curriculum. Some states, however, contend that only through the total prohibition of home instruction or the development of comprehensive standards to regulate home instruction can they meet their compelling responsibility to ensure that every child in the state receives an adequate education.

This paper focuses on the constitutional limits of state regulation of home instruction. I intend both to explain the pertinent Supreme Court case law governing this issue and to set forth my views on the manner in which the state may constitutionally regulate the home study option.

1. This paper is adapted from Devins, *A Constitutional Right to Home Instruction*, 62 Wash. U.L.Q. 435 (1984).

I must admit that I tip my hand by referring to home study as an option; for a federal court of appeals in *Duro v. District Attorney*² recently upheld as constitutional North Carolina's prohibition of home instruction. In my view, *Duro* was wrongly decided. Although a state may regulate home study so as to ensure that each child attain a certain level of educational competency, a state cannot deny or make meaningless a parent's right to teach his child at home. To conclude otherwise is to ignore that the parent-child bond is cherished under the Constitution. State interference with that bond must be justified as a matter of necessity and not simple preference. In this paper, I hope to make clear the above point.

Before discussing the specific legal issues raised in this type of case, I think it is important to understand the concerns of the parents and the state. Parents teach their children at home for a number of reasons, the most common of which is dissatisfaction with the academic and social environments of public schools.³ For example, many of these parents are fearful of the "moral breakdown" in our public schools, which they associate with lack of discipline, sexual permissiveness, and drug and alcohol abuse.⁴

A great number of these parents are evangelical Christians who teach their children at home for religious reasons. A frequent complaint of these parents is that public schools have become too "secularized," with the result that religious values no longer have a place in public education.⁵ This "secularization" is attributed to Supreme Court decisions that prohibit organized prayer,⁶ Bible reading,⁷ and posting of the Ten Commandments in public schools.⁸ The inclusion of sex education and evolution courses in the public school curriculum, which some Christian educators find morally objectionable, exacerbates this problem.

In addition to their religion-based criticisms of the public schools, Christian educators also seek to advance a particular set of religious

2. No. 81-13 Civ-2, slip op. (E.D.N.C. Aug. 20, 1982), rev'd, 712 F.2d 96 (4th Cir. 1983), cert. denied, 104 S. Ct. 998 (1984). North Carolina no longer prohibits home study. The Supreme Court of North Carolina ruled that — under state law — state education officials cannot categorically prohibit home instruction. *DeLonte v. State* 329 S.E.2d 636 (N.C. 1985). For further discussion of court decisions interpreting state statutory provisions, see Tobak & Zirkel, *Home Instruction: An Analysis of the Statutes and Case Law*, 8 U. Dayton L. Rev. 1 (1982).

3. For an expanded discussion of parental dissatisfaction with the public school system, see Devins, *State Regulation of Christian Schools*, 10 J. Legis. 351, 355-9; S. Arons, *Compelling Belief* 75-134 (1983); Carper, *The Christian Day School Movement*, 1960-1982, 17 Educ. F. 135 (1983).

4. See D. Ham, *Reasons Why Parents Enroll Their Children in Fundamentalist Christian Schools* (unpublished Ph.D. dissertation, University of Missouri at Columbia, 1982).

5. See Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U. L. Rev. 847; Whithead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implication*, 10 Tex. Tech. L. Rev. 1 (1978).

6. *Engel v. Vitale*, 370 U.S. 421 (1962).

7. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

8. *Stone v. Graham*, 449 U.S. 39 (1980).

values through home education. These parents believe that education should be inherently religious and thus oppose state efforts to license their home study programs. In court, they argue that state efforts to limit or prohibit home instruction deprive them "of their liberty to freely carry out their religious mission in the form of Christian education."⁹

States that seek to limit the home instruction alternative claim that the regulation (or even prohibition) of home instruction is necessary to ensure adequate education of their young. The Virginia State Board of Education, for example, sought to justify a "state approval of home tutor" requirement by suggesting that the home study environment was educationally deficient. The board felt it was reasonable for the general assembly to conclude that the more structured and controlled environment of an educational institution was superior to the more relaxed and private surroundings of a home education program.¹⁰ Similarly, North Carolina sought to prohibit home instruction because the state claimed that it could not rely on the parents to provide the necessary motivation to the child to assure that the child has access to a quality education. "Unlike operators of nonpublic schools, the State believes that it cannot rely on the existence of collective market forces in the form of parental demands and concerns to assure that children have access to an education and that the education provided will be of some minimal quality."¹¹ One other argument advanced by the state in

9. *Bangor Baptist Church v. State*, 549 F. Supp. 1208, 1216 (D. Me. 1982) (citing plaintiff's petition). See also *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983); *State v. Moorehead*, 308 N.W.2d 40 (Iowa 1981); *State v. Weaver*, 294 N.W.2d 883 (N.D. 1980); *State v. Riddle*, 285 S.E.2d 359 (8 Va. 1981).

10. [The home environment usually is marked by relaxation, privacy, and close relationships formed by bonded lifetimes. It is reasonable for the General Assembly to conclude that education is provided to a greater extent in an environment where discipline and control is more objective, where the program and progress of study are verifiable, where the teacher has a singular role as a teacher, where the student has a singular role as student and where the exclusive focus and reason for meeting is the educational program.]

Virginia Supreme Court Bars Parents' "Private School." Educ. Daily, Dec. 9, 1982, at 7. See also *People v. Turner*, 263 P.2d 985 (Cal. Ct. App. 1953), appeal dismissed, 347 U.S. 972 (1954) (parents teaching at home needed training certificate while teachers in private schools did not need a certificate). For the *Turner* court:

The most obvious reason for such difference in treatment is . . . the difficulty in supervising without unreasonable expense a host of individuals, widely scattered, who might undertake to instruct individual children in their homes as compared with the less difficult and expensive supervision of teachers in organized private schools.

263 P.2d at 988.

11. Appellant's Brief at 14, *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), cert. denied, 104 S. Ct. 908 (1984). Thirty-four states permit some form of home instruction. Regulation of home education varies considerably among the states that allow home instruction. At one extreme, Louisiana allows parents to teach their children at home with minimal supervision. Parents need only provide the state board of education with a proposed home study program and have their children take a standardized achievement test at the end of each school year. At the other extreme, Michigan requires that "teachers for home instruction must be certified and instructions must be comparable to that provided in public schools." See generally Tobias & Zirkel, *supra* note 2.

home schooling cases is that "[t]he socialization of children in groups as essential. Only through peer-group schooling can children learn to get along in a highly independent society."¹²

Home study lawsuits pit the parents' interest in directing the educational and religious upbringing of their children against the state's interest in the adequate education of its youth. An understanding of these interests is necessary to answer the question whether parents have a constitutional right to instruct their children in the home.

Education is one of the state's most compelling responsibilities. In *Brown v. Board of Education*,¹³ for example, the Supreme Court commented:

Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education demonstrate our recognition of the importance of education to our democratic society . . . in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education.¹⁴

Philip Kurland similarly noted the central role of schooling in the "American dream." According to Kurland, in America, education became the great equalizer. Individuals could raise their consciousness, ethics, culture, or earning power through education. These benefits to the individual translate into benefits to society. "Thus the United States became one of the most schooled societies in the history of man."¹⁵

Despite its primacy, the Supreme Court has held that education is not a fundamental right.¹⁶ Consequently, courts are reluctant to interfere with state regulations and procedures governing the structure of education.¹⁷ The authority of the state to promulgate reasonable regulations to govern all forms of schooling is beyond doubt. For example, in *Runyon v. McCrary*,¹⁸ the Supreme Court indicated that a constitu-

12. S. Arons, *supra* note 3 at 123. This "socialization" argument has been raised in court cases in Massachusetts, New Hampshire, Kansas and New Jersey. *Perchemildes v. Frizzle*, Civil Act. No. 16641 (Mass. Sup. Ct., Nov. 13, 1978) (rejecting "socialization" argument); *State v. Hoyt*, 146 A. 170 (N.H. 1929) (upholding "socialization" argument); *In re Sawyer*, 672 P.2d 1093 (Kan. 1983) (upholding "socialization" argument); *State v. Massa*, 231 A.2d 252 (N.J. 1967) (rejecting "socialization" argument).

13. 347 U.S. 483 (1954).

14. *Id.* at 493. See also cases cited in Clune, Coons & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Finance Structures*, 57 Calif. L. Rev. 305, 376-78 (1969).

15. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. Va. L. Rev. 213, 215 (1973).

16. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

17. Ironically, the state also has great authority to govern the structure of education because education is one of the state's most compelling responsibilities. See *supra* note 14 and accompanying text.

18. 427 U.S. 160 (1979).

tional right to send children to private schools does not mean that private schools could not be subjected to reasonable government regulation.¹⁹ The well-being of children is clearly within the authority of the state to regulate and protect.²⁰ State power over the child may extend even beyond the exercise of constitutional rights by parents. In *Prince v. Massachusetts*,²¹ for example, the Supreme Court upheld child labor laws over a legitimate free exercise claim. In so doing, the Court ruled that neither religion nor parenthood place the family beyond state regulation in the public interest.²² Acting to guard the general interest in the youths' well-being, the state may restrict the parents' control by requiring regular school attendance or prohibiting child labor.²³

State intervention in the parent-child relationship can be justified under one of two standards. One standard governs state intervention pursuant to the state's interest as a collective entity. The other standard governs state intervention on behalf of the child as a developing individual.²⁴

The state's collectivist interest is merely an exercise of the state police power designed to promote the public welfare.²⁵ The scope of the legitimate governmental interference with the parent-child relationship on collectivist grounds is quite narrow. Judicial recognition of the fundamental nature of the parent-child bond mandates strict scrutiny of state efforts to interfere with that relationship. As stated in *Prince v. Massachusetts*:²⁶ "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."²⁷ In *Roe v. Wade*,²⁸ the Supreme Court elaborated on the *Prince* ruling by suggesting that the fundamental privacy concept has "some extension" to family relationships.²⁹

19. *Id.* at 178.

20. *Ginsburg v. New York*, 390 U.S. 629, 639 (1968).

21. 321 U.S. 158 (1943).

22. *Id.* at 166. The *Prince* Court also recognized the primacy of parental authority over their children. See *infra* note 27 and accompanying text.

23. 321 U.S. at 166.

24. See Knudsen, *The Education of the Amish Child*, 62 Calif. L. Rev. 1506, 1511-17 (1974); Project, *Education and the Law: State Interests and Individual Rights*, 74 Mich. L. Rev. 1371 (1976); Note, *State Intrusion into Family Affairs: Justification and Limitations*, 26 Stan. L. Rev. 1383 (1974).

25. *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1199 (1980). "A large number of state ends have been considered legitimate objectives of the police power, including the promotion not only of the public health, safety, morals, or general welfare, but also more abstract goals like aesthetic and family values."

26. 321 U.S. 158 (1943).

27. *Id.* at 166. Likewise, in *Meyer v. Nebraska*, 252 U.S. 390 (1923), the Supreme Court stated that "to marry, establish a home, and bring up children" is a constitutionally protected form of liberty. *Id.* at 399.

28. 410 U.S. 113 (1973).

29. *Id.* at 152-156. Similarly, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1973), the Supreme Court invalidated a zoning ordinance that prohibited extended family members

Strict scrutiny analysis requires the state to demonstrate that its procedures are the least restrictive means available to effectuate some compelling state interest.³⁰ Few state regulations governing family conduct can pass constitutional muster under this standard. To justify an infringement of family affairs in the name of the state's collective interest, the state would have to demonstrate that its regulation prevents a near-certain societal harm. For example, regulations requiring children to be inoculated against contagious diseases embody one sufficiently strong state interest.³¹ Whether less tangible dangers, such as the inability of an undereducated child effectively to exercise his franchise in a participatory democracy, constitutes a sufficiently compelling state interest is a more difficult question. The court's decision to uphold child labor laws in *Prince* suggested that the state might have such authority. Yet, in *Wisconsin v. Yoder*,³² the Supreme Court held that the state's interest in compulsory education was not of sufficient magnitude to override a parent's interest in having the child exempted from public school for religious reasons.

from residing in a single family dwelling because "freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 499. The plurality opinion was of the view that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition." *Id.* at 503-04. See also, *Stanley v. Illinois*, 405 U.S. 645 (1972), (invalidating a state statute providing that illegitimate children, upon the death of their mother, become the wards of the state without a hearing on the parental fitness of the father); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (state must demonstrate compelling interest to interfere with a woman's decision to have a child); *United States v. Orito*, 413 U.S. 139, 142 (1973) (constitutional right of privacy includes right of marriage, procreation, motherhood, child-rearing, and education); *Loving v. Virginia*, 388 U.S. 1 (1967) (freedom of choice in marital decisions); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing, in the family context, that "the specific guarantees in the Bill of Rights have penumbras . . . that help give them life and substance").

In contrast to this group of cases, the Supreme Court affirmed without opinion, the district court in *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd without opinion*, 423 U.S. 907. The *Baker* court, in recognizing the legitimacy of a state's *parens patriae* power in the corporal punishment context, held that "parental control over childrearing" should not be considered a fundamental right "in the hierarchy of constitutional values." *Id.* at 299. The Supreme Court approved the use of corporal punishment in a subsequent decision, *Ingraham v. Wright*, 430 U.S. 651 (1977), without directly addressing the "fundamental rights" issue. See also *Wyman v. James*, 400 U.S. 309 (1971) (holding that the state's *parens patriae* interest in the child was sufficient to justify home visits by welfare caseworkers).

30. See L. Tribe, *American Constitutional Law* 1000-60 (1978).

31. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court upheld the right of the state to compel immunization of its citizens.

32. 406 U.S. 205 (1972). *Prince*, speaking in general terms of "the crippling effects of child labor" 321 U.S. at 168, ignored the peculiar circumstances of the case. See *id.* at 173 (Murphy, J., dissenting). *Yoder*, on the other hand, focused on these particular circumstances. For this reason, Philip Kurland suggested that *Yoder* made *Prince* an "unworkable precedent." Kurland, *supra* note 15, at 243.

States also attempt to justify their efforts to interfere in family affairs on the ground that the state has a right to protect the personal interests of a child—the state's role as *parens patriae*. The state's *parens patriae* power allows the state to interfere in family matters to protect the child's physical, educational, and emotional well-being.³³ The state may exercise its *parens patriae* power in the face of parental neglect.³⁴

No bright line exists between acceptable and unacceptable parental behavior. Clearly, the state can demand that a child receive life-saving medical treatment.³⁵ The line between parental punishment and child abuse or between inattention and abandonment, however, is not so clear.³⁶

States justify their compulsory education laws on both collectivist and *parens patriae* grounds. In *Wisconsin v. Yoder*³⁷ the Supreme Court recognized the legitimacy of both of these state interests. The Court approved the state's contention that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."³⁸ The Court also acknowledged the state's *parens patriae* rights: "Education prepares individuals to be self-reliant and self-sufficient participants in society."³⁹

Although the Court in *Yoder* recognized the legitimacy of a state's interest in mandating compulsory education, it upheld the claims of

33. Note, *supra* note 24, at 1391-92.

34. S. Katz, *When Parents Fail* 57 (1971). Neglect statutes "in many respects, incorporate a community's view of parenthood. Essentially, they are pronouncements of unacceptable child practices."

35. See, e.g., *People ex rel. Wallace v. Labrenz*, 104 N.E. 2d 769 (Ill. 1952), *cert denied*, 344 U.S. 824 (1952); *State v. Perrine*, 181 A.2d 751 (N.J. 1962), *cert. denied*, 371 U.S. 890 (1963); *In re Clark*, 185 N.E.2d 128 (Ohio 1962).

36. Until the Supreme Court's landmark 1967 decision, *In re Gault*, 397 U.S. 1 (1967), courts were fairly deferential when reviewing an exercise of a state's *parens patriae* power. See *Developments in the Law*, *supra* note 25 at 1221-27. *Gault* held that the *parens patriae* doctrine was of "dubious relevance" in the juvenile delinquency context and thus the state could not invoke it to immunize state delinquency statutes from constitutional scrutiny. 397 U.S. at 44-56. Following *Gault*, courts began to invalidate certain *parens patriae* exercises on procedural due process, void-for-vagueness, substantive due process, or first amendment grounds. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1977) (substantive due process); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (first amendment); *Breed v. Jones*, 421 U.S. 159 (1975) (procedural due process); *Davis v. Smith*, 583 S.W.2d 37 (Ark. 1979) (void for vagueness).

37. 406 U.S. 205 (1972).

38. *Id.* at 221.

39. *Id.* Justice White, concurring, recognized a broader *parens patriae* interest, which included "the [state's] right to make a 'cultural' guess, the right to be able to predict the attributes of our future culture and design an 'educational package' to equip the child with the necessary cultural survival skills." *Id.* at 238-39 (White, J., concurring). According to

members of the Old Order Amish Faith who sought to exempt their children from high school attendance. First, the Court emphasized the diluted state interest in educating fourteen- and fifteen-year-old children who were socially acculturated and mentally developed.⁴⁰ Second, the Court accepted the proposition that the early teenage years were crucial in determining whether a child would remain a part of the Old Order Amish and, therefore, elevated the parents' interest in removing their children from school.⁴¹

The exemption granted the Amish in *Yoder* should not be construed as an unlimited license for parents to control the education of their children. At the outset, the Court noted: "There is no doubt as to the power of a State, having a high responsibility for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a state."⁴² In addition, the Court stressed the self-contained nature of the Amish community.⁴³ Apparently, the Court would not have exempted the children in *Yoder* from public school attendance if they seemed likely to become members of the mainstream society.⁴⁴ Even if the children were to become part of the self-contained Amish community, the court would not have permitted their removal if they were too young to have acquired basic academic skills.⁴⁵ Finally, the Court suggested that it would not accord a similar right to parents who

Justice White, "[a] state has a legitimate interest . . . in seeking to prepare [children] for the lifestyle that they may later choose." *Id.* at 240.

40. *Id.* at 223-25. In response to this conclusion, Philip Kurland noted:

Never, I submit has the concept of the importance of secondary education received such a blow from the judiciary. Secondary education may not be regarded by a state as essential to "the physical or mental health of the child or to the public safety, order, or welfare" of the state. What is the justification for compulsory secondary education then? How could a state ever meet the burden placed on it by the Court here to show that it has a valid interest in educating its children beyond the primary grades?

Kurland, *supra* note 15, at 229-30.

41. 406 U.S. at 217-18.

42. *Id.* at 213.

43. *Id.* at 215-17. The Amish Order is distinct from other religions in that their daily life and religious practice stem from their literal adherence to "the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world.'" *Id.* at 216.

44. *Id.* at 215-17. The majority paid little attention to evidence produced by the state that "a significant number of Amish children do leave the Old Order." *Id.* at 245. (Douglas, J., dissenting). Instead, the majority assumed that the child would choose as an adult to remain in the Amish community. *Id.* at 224-25.

45. *Id.* at 225 (Court recognized need for minimum academic standards to fulfill the "social and political responsibilities of citizenship"). Significantly, the Court approvingly cited testimony of education expert Donald Erickson "that the Amish succeed in preparing their high school age children to be productive members of the Amish community. . . . [T]heir system of learning through doing the skills directly relevant to their adult roles in the Amish community [is] 'ideal' and perhaps superior to ordinary high school education." *Id.* at 212.

wished to remove their child from school for nonreligious reasons.⁴⁶ The Court emphasized that "[the compulsory attendance law] carries with it precisely the kind of objective danger to the free exercise of religion that the first amendment was designed to prevent."⁴⁷

Despite the fact-specific nature of the opinion, much in *Yoder* suggests that parents have broad discretion to direct the upbringing of their children. Of foremost importance, the Court concluded that the state's communitarian and *parens patriae* interests were not sufficiently compelling to justify interference with family matters. According to the Court, "this case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."⁴⁸ The Court's willingness to look at the peculiar circumstances of the case suggests that parents, at least in the religious liberty context, will be able to make evidentiary showings as to the adequacy of their child-rearing to exempt their children from otherwise reasonable state education regulations.⁴⁹ *Yoder* also contains substantial language concerning the parent's traditional rights in the child-rearing process. Exemplary of this language is the Court's comment that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."⁵⁰ The Court further noted that the parents' right to prepare their children for additional obligations extended to "the inculcation of moral standards, religious beliefs, and elements of good citizenship."⁵¹ Finally, in the case of free exercise challenges, the Court held that states should respect parental decisions

46. The Court noted:

[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, . . . their claims would not rest on a religious basis . . . [nor] rise to the demands of the Religion Clauses.

Id. at 215-16.

In many respects, this distinction between a parent's right to direct the religious upbringing of his child and a parent's right generally to direct his child's upbringing is unpersuasive. Granted, the religious liberty interest might form the basis of a stronger constitutional claim for exemption. See, e.g., Boothby, *Government Entanglement with Religion: What Degree of Proof is Required?*, 7 Pepperdine L. Rev. 613 (1980); Devins, *A Fundamentalist Right to Education?*, Nat'l L.J. (Feb. 21, 1983). Yet parents have a fundamental liberty interest in deciding the general upbringing of their children. See *infra* notes 57-63 and accompanying text. Consequently, any state infringement on the parent-child relationship should demand of the state a demonstration that the intervention will serve its professed goal.

47. 406 U.S. at 218.

48. *Id.* at 230.

49. In this respect, the Court applied a different approach to the parent-state controversy in *Yoder* than in *Prince*. See *supra* note 32.

50. 406 U.S. at 232.

51. *Id.* at 233.

unless it appears that their decisions "will jeopardize the health or safety of the child or have a potential for significant social burdens."⁵²

The *Yoder* Court's endorsement of parental rights typifies family law jurisprudence. For example, in *Parkam v. J.R.*,⁵³ the Court upheld a Georgia statute providing for admission to state mental hospitals through parental request. After admission, the hospital staff would decide whether the child should be released or kept under care. The Court held that reliance upon the parental request was proper because the law presumes that parents possess both maturity and judgment to guide their children, but more importantly, because the parent-child bond will cause the parents to act in the best interest of their child.⁵⁴ Support for the notion of parental control can also be found in a group of Supreme Court cases that upheld constitutional claims made by school-

52. *Id.* at 234. The *Yoder* Court did not, however, address the question whether an Amish child might have an independent right to attend public high school over his parents' objections. Justice Douglas dissented on this issue, noting that:

It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today.

Id. at 245 (Douglas, J., dissenting).

53. 442 U.S. 584 (1979).

54. *Id.* at 602. John Garvey similarly commented:

It is the parents who are most familiar with the effects a particular design might have on their child. They are also in the best position to understand the motives behind a child's wishes and, indeed, to know what the child's unrepresented wishes are. A family right to autonomy would maximize the communication between family members. Moreover, family members are likely to be more capable than the state of providing the kind of continuing understanding and care necessary after any decision has been made that affects the long-term welfare of the child.

Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. Calif. L. Rev. 769, 816-17 (1978). The presumption that parents act in the "best interests" of their children is evidenced by the fact that courts require parental consent generally for all but life-saving medical treatment. See, Brown & Truitt, *The Rights of Minors to Medical Treatment*, 28 DePaul L. Rev. 289 (1982).

Limiting this parental authority are several Supreme Court decisions that recognize the minor's right to privacy to make decisions concerning abortion and birth control. See, e.g., *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976), (invalidating state statute that granted parents an absolute veto over a minor child's right to have an abortion); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (granting minors a right to be free from blanket prohibitions against the distribution of contraceptives). But, in *Bellotti v. Baird* 433 U.S. 622 (1979), the Supreme Court suggested that a state could require minor children to obtain either parental consent or court approval for an abortion. The Court observed that such a statutory scheme would preserve the child's rights, and at the same time provide a legitimate reinforcement of parental authority by the state. For the Court:

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

Id. at 638-39.

children against actions taken by local boards of education.⁵⁵ In this group of cases, the Court implicitly recognized the coextensive nature of the rights of parent and child.

Judicial deference to parental control thus often is grounded in pragmatic terms. A recent commentary summarized the reasons for this deference as follows: (1) parents are more sensitive to their child's needs than the state can possibly be; (2) parents will probably act in the child's best interest because of the close familial relationship; (3) the parental right to control the child's upbringing preserves the diversity of American society and serves as a barrier to state indoctrination.⁵⁶

The *Yoder* Court's exemption of Amish children from compulsory attendance laws is the strongest Supreme Court statement on parental authority over their children's education. To the extent that the Court was addressing parents' religious claims, the Court's delineation of the extent of parental authority holds true. *Yoder*, however, contains too much language about the general authority of the state in education to be considered a strong precedent in favor of nonreligious claims.

Nonreligious claims find strong support in a group of decisions from the 1920s that recognized the due process rights of parents to direct their child's upbringing. The first case, *Meyer v. Nebraska*, involved a state regulation that prohibited the teaching of any language other than English through the eighth grade.⁵⁷ The Supreme Court found the regulation unconstitutional because "[a teacher's] right to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the [fourteenth] [a]mendment."⁵⁸ Although the Court acknowledged that "[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand discussions of civil matters is easy to appreciate," it concluded that such efforts to homogenize the young represent "ideas touching the relationship between individual and State [that are] wholly different from those [pluralistic notions] upon which our institutions rest."⁵⁹

Expanding on *Meyer*, the Court in *Pierce v. Society of Sisters*,⁶⁰ explicitly recognized the right of parents to direct the upbringing of

55. See, *Island Tree Union School Dist. v. Pico*, 457 U.S. 853 (1982) (right to receive information); *Plyer v. Doe*, 457 U.S. 202 (1982) (equal educational opportunity-nationality); *Goss v. Lopez*, 419 U.S. 565 (1975) (procedural due process); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (equal educational opportunity-wealth); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (free speech); *West Virginia v. Barnette*, 319 U.S. 614 (1943) (freedom of conscience).

56. *Developments in the Law*, *supra* note 25, at 1354. In addition to these pragmatic concerns, John Garvey noted that there is a legitimate parental interest in "living one's life through one's children, [which] might be called the parent's right to exercise his religion *through* the child, and to extend *through* the child ideas, language, and customs which the parent believes to be important." Garvey *supra* note 54, at 806.

57. 262 U.S. 390 (1923). Under this regulation, a court held a private tutor criminally liable for teaching German to an elementary school student.

58. *Id.* at 400.

59. *Id.* at 402.

60. 268 U.S. 510 (1925).

their children. In *Pierce*, the Court held unconstitutional an Oregon statute that required all children to attend public schools. The Court ruled that the State could not outlaw private schooling and that the Oregon statute would cause a state-imposed standardization that is contrary to the fundamental theory of liberty upon which American government is based. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."⁶¹

In the last of these early decisions, *Farrington v. Tokushige*, the Court held unconstitutional a statute that sought to promote the "Americanism" of pupils attending foreign language schools in the territory of Hawaii.⁶² The Court held that these regulations "would deprive parents of fair opportunity to procure for their children" "instruction which they think is important and we cannot say is harmful."⁶³

Recent Supreme Court decisions have eschewed these substantive due process principles which grounded *Meyer*, *Pierce*, and *Farrington*. Consequently, the right of parental control has only questionable significance to future challenges to state regulation. In fact, the Supreme Court now recognizes the constitutionality of reasonable state regulations of private schools that promote a compelling state interest in education. In *Board of Education v. Allen*,⁶⁴ for example, the Court observed that "[s]ince *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training and cover prescribed subjects of instruction."⁶⁵ The state therefore has the authority to impose reasonable regulations on the secular educational function of private schools or home study.⁶⁶ But, the Supreme Court has yet to determine where it

61. *Id.* at 535. The Court, however, recognized that:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils, to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. at 534.

62. 273 U.S. 284 (1927). This legislation gave the territorial government the power to prescribe the schools' curriculum, entrance qualifications, attendance requirements, textbooks, and teacher qualifications. In addition, the territorial government received the authority to regulate the physical plant of schools, inspect facilities and teaching, collect fees, and issue permits.

63. *Id.* at 298.

64. 392 U.S. 236 (1968).

65. *Id.* at 245-46.

66. See authorities cited in Note, *The State and Sectarian Education: Regulation to Deregulation*, 1980 Duke L. J. 801, 811-12 n.59.

should draw the line between reasonable and unreasonable state regulations.

Without explicit Supreme Court guidance, it should come as little surprise that the totality of state and lower federal court decisions are not especially helpful in determining whether a state can constitutionally prohibit home instruction. Several courts have intimated that no such constitutional right exists.⁶⁷ Other courts have suggested that such a right might be grounded in the due process clause of the fourteenth amendment,⁶⁸ or the free exercise clause of the first amendment.⁶⁹ With the exception of a North Carolina lawsuit, *Duro v. District Attorney*, which will be discussed subsequently, court decisions which have addressed the issue of the constitutional rights of parents to utilize the home study option are of little precedential significance. The simple reason being that these court opinions have concerned regulations in states that permit some types of home instruction.⁷⁰

When *Duro* was decided, North Carolina prohibited all home study. By upholding this absolute prohibition in 1983, the Fourth Circuit Court of Appeals indicated that a parent's interest in directing his child's upbringing (religious or otherwise) does not extend to home study.

The balancing of parental and state interests in North Carolina is especially complicated because of a 1979 state enactment which effec-

67. See *Hanson v. Cushman*, 490 F. Supp. 109, 114 (W.D. Mich. 1980) ("The plaintiffs' claimed right to educate their children through a program of home study free from [state] requirement[s] . . . does not rise above a personal or philosophical choice, and therefore is not within the bounds of constitutional protection."); *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 455, 461 (N.D. Ill. 1974) (same); *State v. Hoyt*, 84 N.H. 38, 40, 146 A. 170, 171 (1929) ("The state being entitled to supervise education, it is not an answer to a charge of failure to furnish supervised instruction to show that equivalent unsupervised instruction is given."); *Shoreline School Dist. No. 412 v. Superior Court*, 346 P.2d 999, 1003 (Wash. 1960), cert. denied, 363 U.S. 814 (1960) ("We find no merit in the contention of the [parents] that they are excused from the penalties of the compulsory school attendance law because school attendance is repugnant to their religion.")

68. See *Perchemlides v. Frizzle*, No. 16641, at 9 (Mass. App. Ct., Nov. 13, 1978) ("Nonreligious as well as religious parents have the right to choose from the full range of educational alternatives for their children."); *Pierce v. New Hampshire State Bd. of Educ.*, 768, 451 A.2d 363, 367-68 (N.H. 1982) (Douglas and Brock, J.J., concurring) ("approval requirements for nonpublic school education may not unnecessarily interfere with traditional parental rights"); *People v. Turner*, 98 N.Y.S.2d 886, 888 (N.Y. App. Div. 1950) ("provided the instruction given is adequate and the sole purpose . . . is not to evade the statute, instruction given to child at home by its parent, who is competent to teach, should satisfy the requirements of the compulsory education law").

69. See *State v. Nobel*, Nos. S-791-0114-A, S-791-1005-A at (Mich. Dist. Ct., Allegheny County, Jan. 9, 1980) ("No evidence has been introduced in this case that would demonstrate that the state has a compelling interest in applying teacher certification laws to the Nobels [parents] or that the educational interest of the State could not be achieved by a requirement less restrictive on the religious beliefs of the Nobels.")

70. Another reason why courts have not resolved the constitutional issue is that litigants frequently do not raise this issue before the courts. In *State v. Lowry*, 383 P.2d 962 (1963 Kan.), for example, the Kansas Supreme Court upheld a public-or-private-school-only statute on statutory grounds because the question presented to the court was whether a home instruction program constituted a private school.

tively deregulated nonpublic schools.⁷¹ Under, this statute, a nonpublic school would satisfy state standards merely by maintaining attendance and disease immunization records and by periodically administering a nationally recognized student competency examination.⁷² Such deregulation, for the appellate court,⁷³ did not limit the state's compelling interest in compulsory education. Apparently, the appellate court would view *any* state regulation as preserving that compelling state interest. Second, the Fourth Circuit held that *Wisconsin v. Yoder* did not provide a source for parents' constitutional interest in home instruction. The appellate court viewed *Yoder* as a very narrow ruling — stressing the "self contained" nature of the Amish community and the limited exemption from secondary schooling sought by the Amish.⁷⁴ The appellate court did not view *Yoder* as balancing the state's interest in compulsory education against the parents' religious liberty interest.⁷⁵ Instead, the Fourth Circuit viewed *Yoder* as a fact-specific holding inapplicable to other types of religious exemption claims. Consequently, the appellate court rejected the parent's claim because "Duro [the parent] has not demonstrated that home instruction will prepare his children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system."⁷⁶

In my view, *Duro* was wrongly decided. In explaining why I think this is so, I will review what I consider the appropriate bounds of state regulation of home instruction.

Duro can be criticized on two levels. First, by placing the burden of proof on parents, *Duro* represents a dramatic shift from *Yoder*, which sought to balance the competing interests of the parents and state.

71. N.C. Gen. Stat. § 115C-378 (1980). The state legislature passed this statute in response to a state court decision which upheld — over religious liberty objections — comprehensive regulations of private schools, including teacher certification. *State v. Columbus Christian Academy No. 78* (Wake County, N.C. Super. Ct. Sept. 1, 1978), *vacated as moot and dismissed*, (N.C. May 4, 1979).

72. N.C. Gen. Stat. § 115C-378 (1980).

73. The federal district court concluded that the state's interest in education "is little more than an empty concern." No. 81-13-Civ.-2 slip op. at 7 (E.D.N.C. Aug. 20, 1982). Relying, in part, on the Supreme Court's *Wisconsin v. Yoder* decision, the district court held that because the North Carolina legislature "has abdicated its interest in the quality of education received by students in nonpublic schools in favor of 'the rights of conscience,'" the state interest was outweighed by the parents' religious liberty interest. *Id.* at 6.

74. 712 F.2d at 98.

75. *Id.* ("The facts in the present case are readily distinguishable from the situation in *Yoder*. The Amish were a 'rural self-sufficient community.'") Additionally, the appellate court never addressed the issue whether parents might have a due process right to teach their children at home." See *supra* notes 57-63. Clearly, since *Yoder* recognized that religion-based claims were more compelling than secular claims, the parents would have lost on this issue. See *supra* note 46. Moreover, Mr. Duro's attorney never raised this issue in his brief before the appellate court.

76. 712 F.2d at 99. Significantly, in their statement of the facts, the appellate court noted that "despite Duro's concern that his children be sheltered from corrupting influence, he admits that when they reach eighteen years of age, he expects them to 'go out and work . . . in the world.'" *Id.* at 97.

Second, *Pierce* suggests that parents have a right to shape the contours of their children's education. Consequently, it appears that academic achievement, rather than socialization, is the essence of the state's compelling interest in education. Therefore, the *Duro* court was wrong to emphasize socialization. By failing to take into account both the primacy of parental rights and the nature of the state's interest in education (not socialization), the *Duro* court never seriously evaluated the scope of legitimate state authority over home instruction.

The state clearly has a legitimate interest in ensuring that all children are afforded the opportunity to become viable members of contemporary society. Yet, the state must demonstrate that its actions will serve this legitimate purpose before it interferes with the parent-child relationship. Robert Burt, looking at Supreme Court decisions protecting other "fundamental rights" from state intrusion, suggested the following standard: "[1] Has the need for state intervention been convincingly identified, and [2] is there a close correspondence between that need and the means proposed to satisfy that need."⁷⁷ In other words, "when the state contravenes parental decisions in child rearing with the claimed purpose of benefiting the child, the state must present a convincing case that its intervention, in fact, will serve its professed goal."⁷⁸

A state would be hard pressed to justify a total prohibition of home instruction under this standard. North Carolina, in the *Duro* lawsuit, contended that it "does not permit home instruction because [it] has no mechanism by which to assure that children in a home with their parents are provided access to any education whatsoever."⁷⁹ This justification seems spurious because the state could demand that home study students be taught by a capable teacher or pass competency examinations. In short, it would appear that the state could satisfy its interest in education through less restrictive means than the total prohibition of home study.

The state clearly has authority to impose some regulations on home study programs. It is, however, difficult to draw the line separating permissible from intrusive regulations. Regulations governing core curriculum, length of school day and school year, student reporting and competency examinations are clearly constitutional. Expansive curriculum requirements or state prescribed textbooks, however, are unconstitutional.⁸⁰ The real difficulty lies in the evaluation of intermediate curriculum and teacher certification requirements. Teacher certification is a particularly knotty issue because, in many cases, requiring certification will effectively foreclose the home study alternative. Considering that competency examinations can ensure adequate achievement prior to academic advancement, it would appear that teacher

77. Burt, *Developing Constitutional Rights of, in and for Children*, 39 *Law & Contemp. Probs.* 118, 127 (1975).

78. *Id.*

79. *Duro v. District Attorney*, No. 81-13-Civ.-2, slip op. at 6 (E.D.N.C. Aug. 20, 1982).

80. Court rulings on the analogous issue of the constitutionality of state regulations governing Christian day schools support this conclusion.

certification requirements that are so stringent as to preclude the home education option probably are unconstitutional.⁸¹

Competency examinations provide the best vehicle to balance the state's interest in an educated populace against a parent's interest in directing the upbringing of his children.⁸² State objections to achievement tests are unconvincing as a policy matter. The state contends that its objective is not merely to identify those students who do not learn their lessons; rather, it is to promote the likelihood that the educational system will provide every child with the basic education to function effectively in society. Thus the state may view after-the-fact regulations as an ill-fitted substitute for state-imposed educational standards. Underlying (and ultimately fatal to) this argument is the presumption that a substantial enough number of those home study students will fail to justify state-imposed burdens on pluralism, religious liberty, and parental rights. The evidence, however, is to the contrary.⁸³ If anything, it appears that parents who teach their children at home are doing a better job than the public schools.⁸⁴

It is impossible to provide a hard and fast determination of what the state can and cannot do in its regulation of home study programs. Yet, neither the state's communitarian interest in a well-functioning open political system, or its *parens patriae* interest in the eventual economic self-sufficiency of its youth, is sufficiently strong to justify a total prohibition of home instruction.⁸⁵ A parent's right to direct the religious upbringing of his child should carry with it the right to a meaningful home study option. Until the Supreme Court chooses to review this issue, it appears that the basic questions concerning parental authority in the instruction of their children will be discerned through an entangled body of state court decisions.

81. The state can still require ad hoc determinations of competency. The state, however, probably cannot demand that parents comply with such formalistic criteria as receipt of a college diploma.

82. For an alternative suggestion, see Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. Fam. L. 353, 374-77 (1979-80) (recommending home visits and other types of professional evaluation).

83. See *The Exempt Status of Private Schools: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess., 554-56 (1979) (Testimony of Dr. Paul Kienel, Executive Director of the Association of Christian Schools International).

84. See Heard, *Church-Related Schools: Resistance to State Control Increases*, Educ. WK., Feb. 17, 1982, at 1, 11, 18. Courts that have addressed this issue in the context of state regulation of Christian schools are evenly divided on the adequacy of competency tests issue. Compare *Kentucky State Bd. v. Rudisill*, 589 S. 2d 877, 884 (Ky. 1979) (encourages the use of such tests) with *State v. Faith Baptist Church*, 381 N.W2d 571, 579-80 (Neb. 1981) (criticizes the use of such tests).

85. For a similar conclusion, see Note, *The Right to Education: A Constitutional Analysis*, 44 U. Cin. L. Rev. 795, 809 (1975) ("At the very least the substantive due process theory calls into question the constitutionality of compulsory education for many children."); Note, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. Rev. 191, 206 ("any compulsory education statute which does not allow [or places severe limits on] home instruction . . . should be struck down as violative of the Constitution").

Home Instruction: Two Views

Part II Constitutional Contours to Home Instruction A Second View

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Some points of the preceding paper¹ are debatable. For example, the available evidence is too scant and skewed to justify the unqualified generalization that "parents who teach their children at home are doing a better job than the public schools."² Similarly, Devins' dual building blocks of communitarian and *parents patriae* interests, as he elsewhere admits,³ are inexact concepts subject to normative judicial interpretation. Yet he relies on the Hart standard to constitutionally apply these interests to home instruction without showing that it is judicially accepted, much less controlling.

However, reversing and revising Shakespeare, I come to complement Devins, not to bury him. His paper is prescriptive. He argues that parents should be constitutionally entitled to educate their school-aged children at home, based on the free exercise clause of the first amendment and the due process clause of the fourteenth amendment. My paper is descriptive. I conclude that rather than being "entangled,"⁴ the lower courts have provided a relatively long and consistent line of reported decisions that specifically reject the purported first amendment and fourteenth amendment rights to home instruction.

First Amendment Free Exercise

In support of his assertion of a preponderating first amendment religious right to home instruction, Devins principally relies on *Wiscon-*

1. Devins, *State Regulation of Home Instruction: A Constitutional Perspective*, in *School Law Update 1986* (T. Jones & D. Senior eds., in press).

2. *Id.* at n.n.84, 85 and accompanying text. For a more specific analysis, see the sources cited in note 30 *infra*.

3. See Devins, *A Constitutional Right to Home Instruction?*, 62 Wash. U.L.Q. 435, 468, 470 (1982); cf. Martin, *Excluding Women from the Educational Realm*, 52 Harv. Educ. Rev. 181 (1982) (public, or productive, purpose and private, or reproductive, purpose of education).

4. Devins, *supra* note 1 at n.n.84, 85 and accompanying text.

sin v. Yoder.⁵ This reliance is problematic. He identifies some but not all of the limitations imposed by the *Yoder* Court. Although he points to the factual constraint of the religiously self-contained nature of the Amish community, Devins does not allude to the Court's emphasis on the community's economic self-sufficiency, long history, and educational effectiveness.⁶ Indeed, the Court suggested that "probably few other religious groups or sects" could qualify for this limited exemption.⁷ Moreover, the Wisconsin statute was an implied-exception rather than a no-exception, or prohibitive type exception. In that statutory context the Court was careful to not undermine the state's power to reasonably regulate the "continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated."⁸ Despite these severe constraints, Devins portrays *Yoder* as "the strongest Supreme Court statement on parental authority over their children's education," and based thereupon he predicts that "parents, at least in the religious liberty context, will be able to make evidentiary showings as to the adequacy of their child-rearing to exempt their children from otherwise reasonable state education regulations."⁹

Quite to the contrary, in a solid body of reported decisions, courts have narrowly interpreted and applied *Yoder* to consistently reject parents' free exercise challenges against home instruction statutes.¹⁰ The relevance of these court decisions are best understood by grouping them according to the three types of home instruction statutes — 1) those providing an express exception for home instruction; 2) those providing an implied exception, based on language like "equivalent" instruction; and 3) those providing no exception, express or implied.¹¹ A cluster of pre-*Yoder* decisions set the consistent course of precedent by rejecting the free exercise claims of parents in relation to all three types of statutes.¹² The *Yoder* decision did not reverse the direction of the reported cases; subsequent free exercise challenges to no-exception

5. 406 U.S. 205 (1972).

6. *Id.* at 223, 228 (self-sufficiency); 219, 230 (long history); 225 (educational effectiveness).

7. *Id.* at 235-36.

8. *Id.* at 237.

9. Devins, *supra* note 1, at n.n.49-56 and accompanying text.

10. Although referred to herein with a shorthand form of directness as "home instruction statutes," this state legislation is more properly or commonly referred to as compulsory education (or compulsory attendance) laws.

11. Tobak & Zirkel, *Home Instruction: An Analysis of Statutes and Case Law*, 8 U. Dayton L. Rev. 1, 5-12 (1981).

12. No-exception type: State *ex rel.* Shoreline School Dist. No. 412 v. Superior Ct., 346 P.2d 999 (Wash. 1959), *cert. denied*, 363 U.S. 814 (1960); State v. Hoyt, 146 A. 70 (N.H. 1929); State v. Peterman, 70 N.E. 550 (Ind. Ct. App. 1904). Another decision, State v. Garber, 419 P.2d 896 (Kan. 1966), *cert. denied*, 389 U.S. 51 (1967), was consistent with this pre-*Yoder* cluster, but its facts were similar to those of *Yoder*. Implied-exception type: Common-

statutes¹³ have been as consistently unsuccessful as those implied-exception¹⁴ and express-exception¹⁵ statutes.

In total, a long and unbroken line of reported court decisions concerning the first amendment and home instruction, including at least one by a federal circuit court of appeal and four by state supreme courts after *Yoder*, are arrayed against one unreported decision by a county court in Michigan.¹⁶ For example, the Nebraska and Arkansas Supreme Courts and the Fourth Circuit have each upheld the constitutionality of no-exception type statutes with regard to the free exercise clause by clearly, albeit quickly, pointing to the narrow factual constraints of *Yoder*.¹⁷ Court decisions concerning the first amendment, the regulation of parochial schools and dicta from home instruction statutory interpretation cases¹⁸ are less directly relevant. They do not significantly change the clear weight of authority.¹⁹ Thus, the fundamental religious right to home instruction can only be described at this point as being severely limited.

Fourteenth Amendment Liberty

In support of his assertion of a preponderant fourteenth amendment nonreligious right to home instruction, Devins principally relies on *Meyer v. Nebraska*²⁰ and *Pierce v. Society of Sisters*,²¹ both dating back

wealth v. Renfrew, 126 N.E.2d 109 (Mass. 1955). Express-exception type: Rice v. Commonwealth, 49 S.E.2d 342 (Va. 1948).

13. *Duro v. District Attorney*, 712 F.2d 96 (4th Cir. 1983), cert. denied, 104 S. Ct. 998 (1984); *Burrow v. State*, 669 S.W.2d 441 (Ark. 1984); *State v. Morrow*, 343 N.W.2d 903 (Neb. 1984).

14. *State v. Moorhead*, 308 N.W.2d 60 (Iowa 1981); *Jernigan v. State*, 412 So. 2d 1242 (Ala. Crim. App. 1982); *Hill v. State*, 410 So. 2d 431 (Ala. Crim. App. 1981); cf. *Mazanec v. North Judson-Jan Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985).

15. *State v. Riddle*, 285 S.E.2d 359 (W. Va. 1981); *T.A.F. v. Duval County*, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); cf. *Singer v. Wadman*, 595 F. Supp. 188 (D. Utah 1984). In an unreported opinion, Virginia's Supreme Court recently denied the appeal of "traditional Catholic" parents who alleged a free exercise right to home instruction. The parents have filed for certiorari with the Supreme Court. *Snider v. Commonwealth*, No. 84-0377 (Va. S. Ct. Nov. 21, 1984), cert. filed, 54 U.S.L.W. 3071 (U.S. Aug. 6, 1985).

16. *State v. Nobel*, Nos. S791-0114A & S791-0115A (Mich. Dist. Ct., Allegan County, Jan. 9, 1980).

17. See *supra* note 13.

18. Devins, *supra* note 1, at n.68, n.80.

19. For the most recent reported private school decisions, see *Braintree Baptist Temple v. Holbrook Pub. Schools*, 616 F. Supp. 81 (D. Mass. 1985) (upheld requirements as to hours, subjects, and teachers); *Johnson v. Charles City Community Schools Bd. of Educ.*, 368 N.W.2d 74 (Iowa 1985) (upheld rejection of parents' request for "Amish exception" under *Yoder*).

20. 262 U.S. 390 (1923).

21. 268 U.S. 510 (1925).

to the 1920s.²² These Supreme Court decisions were early explorations of the constitutional contours of the two different institutional variants of compulsory schooling — public and private. Neither decision dealt with home instruction, which was a largely distant issue and an arguably noninstitutional form of education. Further, the language about parental liberty rights constitutes dicta in both decisions.²³ The parties facing the state were a private school teacher and private school corporations respectively, not parents. Moreover, with corresponding dicta in *Meyer* the Court recognized "[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools."²⁴ Similarly, in *Pierce* the Court stated: "No question is raised concerning the power of the state . . . to require that all children of proper age attend some school."²⁵

More importantly and again in contrast to that which Devins characterizes in his paper as "an entangled body of state court decisions"²⁶ and "of little precedential value,"²⁷ there has been a substantial line of federal and state court decisions consistently rejecting parental nonreligious challenges to the constitutionality of no-exception²⁸ and implied-exception²⁹ type home instruction statutes.³⁰ The federal district court's following reaction to the plaintiff-parents' assertion of substantive due process, privacy, and equal protection rights is rather typical of the more recent case law:

Plaintiffs have established no fundamental right which has been abridged by the compulsory attendance statute. Thus, the state need not demonstrate a "compelling interest" . . . in requiring children to

22. Devins also cites *Farrington v. Tokushige*, 273 U.S. 284 (1927), to which the following comments *infra* are also applicable.

23. For countervailing dicta about the paramount interest in public education which is based on more recent decisions by the Supreme Court, see *Ambach v. Norwick*, 441 U.S. 68, 76-78 (1979); cf. *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (inculcation of community values).

24. 262 U.S. at 402.

25. 268 U.S. at 534.

26. Devins, *supra* note 1 at n.85.

27. *Id.* at n.70.

28. *Hanson v. Cushman*, 490 F. Supp. 109 (W.D. Mich. 1980); *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452 (N.D. Ill. 1974); *In re Sawyer*, 672 P.2d 1093 (Kan. 1983); *Parr v. State*, 157 N.E. 555 (Ohio 1927); *State v. Edgington*, 663 P.2d 374 (N.M. Ct. App. 1983), *cert. denied*, 104 S. Ct. 354 (1983).

29. *State v. McDonough*, 468 A.2d 977 (Me. 1983); *State v. Bowman*, 653 P.2d 254 (Or. 1982); *In re Shinn*, 195 Cal. App. 2d 603, 16 Cal. Rptr. 165 (Ct. App. 1961); *People v. Turner*, 263 P.2d 685 (Cal. Ct. App. 1953), *appeal dismissed*, 347 U.S. 972 (1954); *Knox v. O'Brien*, 72 A.2d 389 (N.J. Cape May County Ct. 1950); *Stephens v. Bongart*, 189 A. 131 (N.J. Essex County Ct. 1937); *In re Franz*, 390 N.Y.S.2d 940 (N.Y. App. Div. 1977).

30. These fourteenth amendment challenges generally have been formulated in terms of parental liberty or privacy, with lesser use of the equal protection clause. The separate fourteenth amendment challenge of vagueness, which is not part of Devins' thesis, is treated in a subsequent section of this paper.

attend school. Under the test of *Pierce* and *Yoder* the Illinois statute . . . is reasonable and constitutional.³¹

Arrayed against this solid phalanx of authority is one unreported lower court decision that was focused more on the procedural than on the substantive side of the fourteenth amendment.³² Devins dismisses the significance of the few decisions that he cites. He maintains, "[they] have concerned regulations in states that permit some types of home instruction."³³ Rather, five of the decisions cited above dealt with no-exception, or prohibitive, statutes.³⁴ Moreover, by directly addressing not just the complete prohibition but also the comprehensive regulation of home instruction, Devins has opened the door to the immediately neighboring, and most closely analogous, court decisions concerning the other types of such statutes. Thus, as with the first amendment, the fourteenth amendment has been substantively interpreted by the courts quite to the contrary of what Devins prescribes.

Fourteenth Amendment Vagueness

Ironically, the only constitutional avenue by which parents have achieved some notable success specific to home instruction is not addressed by Devins' thesis. Namely, some recent suits have been successful by focusing on the alleged vagueness of one or another terms in the challenged home instruction statute rather than by focusing on the asserted substance of one or another home instruction rights of the challenging parents. Although there has been some success in vagueness challenges against terms like "school"³⁵ and "equivalent,"³⁶ there is countervailing authority that prevents the successful side from being classified as the majority view. The case law concerning this issue is rather recent. It has not clearly crystallized in either direction.

Georgia's Supreme Court held the term "private school," in the absence of a definition or criteria in state regulations, to be constitutionally vague in the criminal context of that state's no-exception compulsory education statute.³⁷ In the context of an implied-exception statute,

31. *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452, 461 (N.D. Ill. 1974).

32. *Perchemlides v. Frizzle*, No. 16641 (Mass. Super. Ct., Hampshire County, Nov. 13, 1978). The focus was an implied-exception statute that, in an earlier version, had been interpreted by the state's highest court in *Commonwealth v. Roberts*, 34 N.E. 402 (Mass. 1893), as allowing home instruction.

33. Devins, *supra* note 1 at n.70.

34. No-exception type statutes are not completely prohibitive to the extent that home instruction qualifies as a private school. Courts have been divided as to this statutory interpretation question. Compare, e.g., *State v. Lowry*, 383 P.2d 962 (Kan. 1963) with *People v. Levisen*, 90 N.E.2d 213 (Ill. 1950).

35. See *infra* notes 37-40.

36. See *infra* notes 41-44.

37. *Roemhild v. State*, 308 S.E.2d 154 (Ga. 1983); cf. *State v. Popanz*, 332 N.W.2d 750 (Wis. 1983) (private school case).

Virginia's highest court and Oregon's intermediate court each rather summarily rejected the argument that "private school" was unconstitutionally vague.³⁸ Similarly, Wisconsin's intermediate appellate court read all of the state's statutes relating to private schools together as providing a definition of "private school" such that persons of ordinary intelligence need not guess its meaning.³⁹ Florida's intermediate appellate court similarly rejected a vagueness challenge focused on the terms "school" and "home" in that state's explicit-exception statute.⁴⁰ Arkansas' highest court disposed of a vagueness challenge to its no-exception statute by treating it as an "as applied" issue, concluding that the other plaintiff-parent lacked standing to raise the issue "on its face."⁴¹

Similarly, the Seventh Circuit partly sidestepped a vagueness challenge to the term "equivalent" in Illinois' implied-exception statute by applying *Pullman*-type abstention, stating en route: "The term 'equivalent instruction' may be brief but brief is not vague."⁴² Iowa's Supreme Court more directly rejected a vagueness challenge to the term "equivalent instruction" in that state's implied-exception statute, pointing to the detailed curriculum requirements for public and nonpublic schools as providing sufficient standards.⁴³ Finding the Missouri statute as "not so readily comprehensible," however, the federal district court in Missouri held the term "substantially equivalent" in that state's implied-exception statute to be constitutionally vague.⁴⁴ Similarly, Minnesota's Supreme Court rejected the term "essentially equivalent" as being unconstitutionally vague in light of the penal effect of Minnesota's implied-exception statute.⁴⁵

In any event, the vagueness argument only extends to the language of the statute and its implementing regulations. Even where the penal effect is clear⁴⁶ or the courts are otherwise strict in applying vagueness challenges, the defect is remediable by adding sufficiently specific definitions or standards. Further, providing sufficiently specific standards for "equivalence," which has been more vulnerable to vagueness challenges, would seem easier than establishing a significantly improved

38. *Grigg v. Commonwealth*, 297 S.E.2d 799 (Va. 1982); *State v. Bowman*, 653 P.2d 254 (Or. Ct. App. 1982).

39. *State v. White*, 325 N.W.2d 76 (Wis. 1982).

40. *State v. Buckner*, 472 So. 2d 1228 (Fla. Dist. Ct. App. 1985).

41. *Burrow v. State*, 669 S.W.2d 441 (Ark. 1984).

42. *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 848 (7th Cir. 1985).

43. *State v. Moorhead*, 308 N.W.2d 60 (Iowa, 1981). This court similarly rejected a vagueness challenge to the connected term "certified teacher."

44. *Ellis v. O'Hara*, 612 F. Supp. 379, 381-82 (E.D. Mo. 1985). Although the statute does not carry criminal penalties, this court found a source of strict scrutiny in the *Yoder-Pierce* constitution interests.

45. *State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985). Although citing *Pierce* without deciding its impact, the court rejected a broad interpretation and application of *Yoder*. *Id.* at 530-32.

46. Query the effect of a provision like that of the Texas Penal Code art. 1.05(a): "The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of the code shall be construed according to the fair import of their terms, to promote justice and the objectives of the code."

definition of "school," which has been thus far more resistant to vagueness challenges. Thus, on the more fundamental level, these challenges do not in themselves preclude prohibiting or closely regulating home instruction programs.

Conclusion

This short paper complements Devins' longer companion paper concerning the constitutional contours of home instruction.⁴⁷ What he prescribes as the judicial norm, I describe as not the judicial norm. The two views are not necessarily contradictory. His focus is not "what is" but "what should be." In our adversarial judicial system, case law changes arise from ardent and artful advocacy by practitioners and scholars. By venturing where I have not, Devins advances a view of what-should-be that may possibly become what-will-be. Even if the courts remain unreceptive, legislatures may more assuredly benefit from his thoughtful analysis.⁴⁸ The current trend among legislators and administrative agencies at the state level is apparently toward allowing home instruction.⁴⁹ At this appropriate level,⁵⁰ without specific constitutional mandates, the political and pedagogical issues of the appropri-

47. These two papers do not address home instruction cases based on statutory interpretation. For case law developments in this separate area, see, e.g., Tobak & Zirkel, *supra* note 11. This case law continues to develop apace. See, e.g., Mazanec v. North Judson-San Pierre School Corp., 614 F. Supp. 1153 (N.D. Ind. 1985); DeLonte v. State, 329 S.E.2d 637 (N.C. 1985); *In re Chapman*, 480 N.Y.S.2d 433 (N.Y. Fam. Ct. 1985).

Nor do these papers focus on recent developments with regard to legislation and regulations. See *infra* note 48 and accompanying text.

48. As the Supreme Court suggested in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42, 58 (1973), such determinations are often better left to the legislative branch.

Parentetically, in the recent Gallup poll on education, the attitudes of the public as to the "home schools movement" were as follows: good-16%, bad-73%, don't know-11%. Their responses as to requiring the same teacher certification standards for home schools as those for the public schools were: should-82%, should not-15%, don't know-8%. *The 17th Annual Gallup Poll*, 67 Phi Delta Kappan 40, 46 (1985).

49. According to Patricia Lines, formerly with the Education Commission of the States, approximately 12 states have changed their laws within the past two years to be less restrictive about home instruction. Telephone conversation, Nov. 8, 1985. This trend is not uniform, being subject to the pushes and pulls of the educational policy making process. See, e.g., *Educ. Week*, Aug. 28, 1985, at 3 (new Maryland regulations reportedly closing loophole in state home education law); *Educ. Week*, June 5, 1985, at 3 (Arkansas attorney general reportedly urging amendment to recently adopted home education law).

50. Although there is other secondary authority agreeing with Devins' view, several scholarly commentators have concluded that home instruction is largely a legislative matter. Compare, e.g., Stocklin-Enright, *The Constitutionality of Home Instruction: The Role of the Parents, State and Child*, 18 Willamette L.J. 568 (1982); Note, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. Rev. 191 (1979) with Comment, *Parental Rights: Educational Alternatives and Curriculum Control*, 26 Wash. & Lee L. Rev. 277 (1979); Note, *Home Instruction: An Alternative to Institutional Education*, 18 J. Fam. L. 353 (1980); Note, *Home Education v. Compulsory Attendance Laws: Whose Kids Are They Anyway*, 24 Washburn L.J. 274 (1983).

ate number and nature of regulatory standards, from competency testing to teacher certification for "reasonable" regulation, are a slippery but central concern. I also compliment, not just complement, Devins for providing a relatively balanced treatment of the case law as part of his advocacy-type analysis.⁵¹

51. Compare Zirkel, *Defense of Home Instruction Not Warranted*, Educ. Week, Oct. 30, 1985, at 19 with Lines, *States Should Help, Not Hinder, Parents' Home-Schooling Efforts*, Educ. Week, May 15, 1985, at 24.

Dynamic Gradualism: Much Motion but Little Progress

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It is risky to speculate about the future in general and the direction of the courts specifically. Yet, because the authors believe that since the *Brown v. Board of Education II* decision the judicial and executive branches of government have relinquished the leadership necessary to address effectively an issue as pervasive as racial discrimination, we must look to the future and speculate.

Brown v. Board of Education I,¹ you will certainly recall, was the decision originally rendered that appeared to end once and for all racial segregation in the United States. But almost since the day it was handed down, legal scholars have been questioning its applications and narrowing its broad effect.² In retrospect, "One perhaps naive premise of the *Brown* decision was that racial [discrimination] could be eliminated through desegregation directed by the courts."³

To this day numerous questions attend the issues associated with racial segregation in public schools as a result of the judicial decisions since *Brown*, and one of these concerns is the distinction, or lack thereof, between de facto segregation (cause by actions other than those of school or governmental officials) and de jure segregation (caused by actual force of law). A pair of quick examples will illustrate the difference between de jure and de facto segregation. De jure segregation can best be explained by the existence in the South of state statutes that prohibited blacks and whites from attending the same school regardless of where they lived. On the other hand, "de facto segregation... occurs when people separate into ethnically or racially similar groups and settle in distinct neighborhoods for a variety of extralegal reasons."⁴ In the latter instance, the people do not congregate in racially defined groups in obedience to some law; rather, they congregate presumably as an expression of personal preference or predilection. "Northern school

1. 347 U.S. 483 (1954).

2. Hall & Henderson, *Thirty Years After Brown: Looking Ahead*, 24 Washburn L.J. 227 (1985).

3. Carter, *Desegregation: Futuristic Considerations*, School Desegregation: A Model at Work 97-106 (F. Aquila & J. Stoehr eds. 1978).

4. Carter, *De Facto-De Jure Segregation: A Questionable Distinction*, 8 NOLPE Sch. L.J. 18 (1979).

boards have traditionally contended that their segregated schools developed in precisely this neutral manner."⁵ Where school districts were designed to be coterminous with neighborhood boundaries, there was no official segregation, and school officials had no legal duty to desegregate. Another concern with regard to racial segregation in public schools has centered on the extent to which subsequent court decisions have eroded the precepts upon which *Brown* is based.

Having examined several judicial decisions on this point, the authors believe that the courts have been, in general, blurring the distinction between de jure and de facto segregation. We contend that court decisions serve to signal whether access to equal educational opportunity is to become a reality for all Americans, and our research does not raise our hopes in this regard. Before discussing the future of desegregation in the United States, we turn to decisions in some of the cases that have specifically addressed de jure and de facto segregation.

Background

Beginning with the *Brown* decision in 1954 through 1974, the Supreme Court ruled on only desegregation cases in the South that involved "state statutes compelling or permitting segregation of public schools along racial lines."⁶ "This judicial stance attacking de jure segregation exclusively was more acceptable to Northerners than the inhabitants of the South, especially since it operationalized the differences in the manner in which the courts were interpreting and applying the law."⁷ During this period the Court held that while public school students had a constitutional right to avoid becoming the objects of discrimination, they did not have a constitutional right to attend or refrain from attending any particular school on the basis of racial considerations unless there had been overt discrimination against them.⁸ This point of view was eventually rejected because of its "disregard for the reciprocal effects of zoning or building decisions and neighborhood school districting."⁹

Logic suggests that a school built in a predominantly black neighborhood will result in that community's becoming more racially isolated instead of less so. For this reason, it should have been anticipated that the courts would eventually rule on such a matter, which the Second Court of Appeals did in *Taylor v. Board of Education of New Rochelle*.¹⁰ A large number of black students in New Rochelle had been assigned to

5. Bavry, *Intention as a Requirement for De Jure School Segregation*, Ohio St. L.J. 653.

6. Carter, *supra* note 4 at 180.

7. McCarthy, *New Directions in Desegregation Litigation*, School Desegregation: A Model at Work 74 (F. Aquila and J. Stoehr eds. 1974).

8. Bavry, *supra* note 5, at 654.

9. 924 F.2d 36 (2d Cir.), *aff'd*, 191 F. Supp. 181 (S.D.N.Y.), *cert. denied*, 368 U.S. 940 (1961).

10. 924 F.2d at 37.

one school. Although the board acknowledged certain school attendance boundaries, it permitted white students but not black students to transfer to other schools. In other words, it created de jure out of a de facto situation (or read it into it).

In *Bell v. School Board of Gary, Indiana*,¹¹ however, the court held that "there is no affirmative constitutional duty to change innocently arrived at school districts by the mere fact that shifts in population have increased or decreased the percentage of [black] or white pupils."¹² Because the ruling was contrary to the earlier decision rendered in *Taylor*, the distinction between de facto and de jure segregation, which appeared to be clear at the time of *Brown*, became less clear with the ruling in *Taylor*¹³ and much less so after *Bell*. Thus, if the motives were free of racial taint, the courts found no duty to desegregate; the segregation remained de facto. If, however, segregation is racially motivated, the same duty arises in the North as in the South to desegregate. In *Taylor*'s district, a finding of pro-segregation motivations within the school board became the equivalent of a statute: both the board and its activity amounted to de jure segregation sufficient to raise an affirmative duty to desegregate. Under the *Taylor* standard, northern plaintiffs could not escape a duty to desegregate by merely pointing to the absence of a segregation statute.¹⁴ Decisions like *Taylor* have, however, "resulted in two lines" of judicial reasoning.¹⁵ But in numerous cases, the Supreme Court has held that the equal protection clause of the fourteenth amendment is not violated when racial segregation results from neutral factors as opposed to state action.¹⁶ The criteria that have been used by the lower courts to determine this "neutrality" include (1) altruistic school board intentions;¹⁷ (2) efforts to establish unitary school systems;¹⁸ and (3) the fact that the school system "honestly and conscientiously constructed [its district] with no intention or purpose to segregate races."¹⁹

In *Jenkins v. Township of Morris School District*,²⁰ the Third Circuit Court of Appeals held that the commissioner of education for the state of New Jersey enjoyed broad powers to deal with de facto segregation ruling contrary to state policy. According to the court, the commissioner had an obligation to act if his failure to do so would result in increased

11. 213 F. Supp. 819 (1963), *aff'd*, 324 F.2d 209 (1963), *cert. denied*, 337 U.S. 924 (1964).

12. *Id.*

13. *Bavry*, *supra* note 5, at 656.

14. *Id.* at 656-657.

15. Abramson, *Constitutional Law—School Desegregation—Constitutional Duty to Desegregate De Facto Segregation*, 23 *Emory L.J.* 299 (Winter 1974).

16. *Id.*

17. *Deal v. Board of Educ.*, 244 F. Supp. 572 (S.D. Ohio 1965), *aff'd*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

18. *Bradley v. School Bd.*, 388 F.Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973).

19. 213 F. Supp. *supra* note 11, at 819.

20. 279 A.2d 619 (N.J. 1971).

segregation. In *Husbands v. Pennsylvania*,²¹ a 1973 case, the court held that although the Constitution may not require school officials to desegregate because of housing patterns, "where schools are not integrated, the separate but equal doctrine should be rigorously applied to ensure the equality of black student educational experience."²²

The other line of judicial reasoning referred to earlier supports the view that, as a practical reality, all segregation arises out of governmental intervention and is, therefore, at least related to de jure segregation.

In *Keyes v. School District No. 1*,²³ the Supreme Court had an opportunity to address a case concerning segregation resulting from such neutral factors as preferred places of residence.²⁴ The primary difference between *Keyes* and the earlier cases was that school officials clearly did not sanction racial segregation, and remember that the legal concept called "intent" provides the distinction between de jure and de facto segregation.²⁵ At the time of the *Keyes* case, however, no guidelines existed for determining an "intent to segregate." The lack of a distinction created a particular problem for the North, where the desegregation cases "turned largely on the presence or absence of segregative intent."²⁶ *Austin*,²⁷ *Evans*,²⁸ *Dayton Board of Education*,²⁹ and *School District of Omaha*³⁰ are only a few of the cases where the courts failed to clarify the distinction between de jure and de facto segregation.

The authors consider Supreme Court Justice Powell prescient when he said that the distinction would probably outlive its time.³¹ Accordingly, Powell believed that a continued reliance on the distinction could confute *stare decisis* and result in unpredictable litigation.³² To this point the authors now turn.

Dynamic Gradualism

Whatever their reasons and motivations, the courts have remained in protracted debate over the elimination of segregation in public schools. While we can find some solace in the fact that cities like Los Angeles, Chicago, St. Louis, and Milwaukee, to name a few, actively pursue desegregation, it is more than ironic that thirty years after the *Brown*

21. 359 F. Supp. 924 (E.D. Pa. 1973).

22. *Id.*

23. 413 U.S. 189 (1973).

24. Goodman, *Constitutional Law - School Desegregation - De Facto Hangs on*, 52 N.S.L. Rev. 431 (1973).

25. *Id.*

26. *Austin Indep. School Dist. v. United States*, 97 S. Cl. 517 (1976), *vacated and remanded* *United States v. Texas Educ. Agency*, 532 F.2d 389 (1976).

27. 97 S. Cl. at 517.

28. *Evans v. Buchanan*, 383 F. Supp. 428 (D. Del. 1975), *aff'd*, 423 U.S. 963 (1975).

29. *Dayton Bd. of Educ. v. Brinkman*, 97 S. Cl. 2796 (1977).

30. *United States v. School Dist. of Omaha*, 389 F. Supp. 293 (D. Neb. 1974), 521 F.2d 530 (8th Cir.), 423 U.S. 946 (1975).

31. *Keyes*, 413 U.S. at 189, 296.

32. *Id.* at 235.

11³³ decision the United States has yet to adopt "all deliberate speed" in eliminating racial segregation. As Laughlin McDonald observed, "[a]ll deliberate speed," the term used in *Brown II*, "was never more than foot shuffling."³⁴ Desegregation has proceeded with relentless logic, "but it has not been with the logic of deliberate speed."³⁵ Though presented with numerous opportunities, the courts have been unable to reach the consensus view that regardless of the contributing factors, segregation is not in the best interest of the nation.

Moreover, some thirty-two years after *Brown* we find that the majority view is now in the minority (or soon will be), and that most public schools in most large cities remain just as segregated as if a law compelled it. Furthermore, in a number of these instances, the fleeing or scattered white population has dropped to less than 25 percent. Further still, black, white, and Hispanic students live in separate communities and give rise to even more refined segregation patterns, even where there is no significant difference in the economic levels of the families living in center city.

As we just suggested, whites over the years have relocated to suburbia, where few minorities live. Hence, the so-called doughnut effect, a form of segregation recognizable enough to have earned a nickname. Some educators would fight the doughnut effect with a system of metropolitan busing. This idea, too, has reached the Supreme Court, which addressed it in *Milliken*,³⁶ *Bradley*,³⁷ and *Indianapolis*.³⁸ While it may be salutary to continue pursuing the goal of metropolitan desegregation, the authors believe that de facto metropolitan desegregation, is just one manifestation of a systemic problem. The United States is at a crossroads and must reaffirm its commitment to the elimination of racial segregation in all public schools. Otherwise, the nation will suffer the profound diminution of the human resource potential that occurs whenever a large group of minority students is denied full academic opportunity.

Although progress has occurred in some areas, the situation has worsened in others. For instance, a study by the Children's Defense Fund indicates that the plight of low-income black children is deteriorating.³⁹ According to the report, twice as many black children as white die in their first year; three times as many are liable to be poor; four times as many are unlikely to live with either parent; and five times as many are liable to be on welfare. Relying on government statistics, the Children's Defense Fund report reveals a widening gap between black and white

33. 349 U.S. 753, 757 (1955).

34. McDonald, *The Song Has Ended but the Melody Lingers On*, 4 J. of L. & Educ. 29.

35. *Id.* at 32.

36. *Milliken v. Bradley*, 418 U.S. 717 (1974).

37. *Bradley v. School Bd. of the City of Richmond*, 338 F. Supp. 67, 104-105 (E.D. Va. 1972).

38. *United States v. Bd. of School Comm'rs of Indianapolis*, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 929 (1973).

39. Children's Defense Fund, *Black and White Children in America: Key Facts* (1985).

children, and concludes that in recent years black children have been sliding backward, suffering increasingly from an inequality that denies them all sorts of opportunities, and especially educational opportunity.

The Future

The National Commission on Excellence in Education (NCEE) reports that approximately "13 percent of all 17-year-olds in the United States can be considered functionally illiterate (and that) functional illiteracy among minority youth may run as high as 40 percent." These statistics are troubling in light of the many court-ordered desegregation plans that adopt at least in part, the assumption that black achievement can be increased thereby. The NCEE report, in effect, draws attention not only to the shortcomings of current educational policies but also to the assumptions that pervade American society concerning minorities and education.

Governmental intervention predicated upon environmental theories of "cultural deprivation" and designed to modify educational inequality created by years of segregation, has lacked clear and definable guidelines, and has, therefore, enjoyed only limited success. Even the distinction between "segregation" and "racial imbalance" remains unclear. According to the United States Office of Education, "desegregation" to overcome "segregation" means "the assignment of children or faculty to public schools and within schools without regard to their membership in a minority group, but 'desegregation' does not mean the assignment of such persons to or within public schools in order to overcome racial imbalance."⁴⁰

What statistical evidence one finds measuring the achievement of minority students attributable to desegregation suggests that, by itself, desegregation does not contribute in a major way to raising educational achievement levels in minority youth. Nancy St. John reviewed more than one hundred studies on the effects of desegregation on the educational achievement level of low-ability black students (studies purporting to measure for example how they have benefited or not benefited from prescribed plans to improve racial balance). She found that the benefits minority students derive from racially balanced schools are minimal to nonexistent.⁴¹ St. John's work does not suggest that the high functional illiteracy rate among minority youth reflects inherent racial inferiority; no legitimate, scientific evidence suggests that racial or ethnic background relates in any way to intellectual capacity. There is some reason, however, to suspect the existence of a definite cultural bias toward curbing the achievement levels of minority students. John Stansfield believes that part of the problem may be an indifference among white capitalists to black educational opportunity. Stansfield

40. J. Harris, Brown to Buckley: A Study of Desegregation, Integration, and Student Attitudes in Seven Marion County, Indiana School Districts (1985).

41. St. John, *School Desegregation: Outcomes for Children* (1975).

suggests that the only real result of school desegregation has been to make blacks better labor market commodities, and he notes this attitude effectively keeps blacks from determining their own social and economic destinies.⁴²

Harris and Bennett (1982) examined student discipline problems in two large urban desegregated school systems and found that a disproportionate number of male minority students had become the principal recipients of the schools' disciplinary mechanisms.⁴³ Much of the dissatisfaction found among minority students reflected a variable Harris and Bennett refer to as "fatalism," or a lack of personal control over the environment.⁴⁴ Other studies suggest that this lack of control, which effectively discourages achievement and amounts to a new form of discrimination, is characteristic of today's desegregated schools.

Where, then, does one turn for help? Statistical analyses of desegregation, using various indices of the relationships among desegregation, achievement, and district demography have so far failed to reduce these relationships to a single index.⁴⁵ Indeed, the courts have failed to mandate any equality of achievement guidelines.⁴⁶ Nor have we yet found education authorities agreeing on what kind of instruction promotes equality of achievement.⁴⁷

Some observers, however, suggest that giving students a stake in the future of their own schools may encourage closer integration as students of all races work to achieve common goals. It can certainly lessen the sense of "fatalism" that pervades the hallways of schools today. These examples include the schools developed under the leadership of the late Ronald Edmonds, Professor of Education at Michigan State University. Edmonds identified five characteristics of schools that have effectively taught poor and disadvantaged youth: (1) leadership, (2) widespread knowledge of a school's purpose, (3) a safe and orderly climate, (4) high teacher expectation and (5) close monitoring with standardized tests.⁴⁸ "None of these characteristics encourages poor and disadvantaged children to think they have made satisfactory progress when they are not even close to mastery."⁴⁹ All five character-

42. Stansfield, *Urban Public School Desegregation and White Domination*, 48 *The Educ. Digest* 34.

43. Harris & Bennett, *Student Discipline: Legal, Empirical, and Educational Perspectives* (1982).

44. Bennett & Harris, *Suspensions and Expulsions of Male and Black Students*, 16 *Urban Educ.* 419.

45. Dziuban & Ester, *Some Relationship Among Indices of School Desegregation*, 20 *Am. Educ. Research J.* 120.

46. Fields & Harris, *Educational Malpractice and the Public's Demand for Accountability*, 8 *Planning and Changing* 10.

47. J. Harris, *supra* note 40, at 5.

48. Harris & Carter, *Effective Desegregated Schools and Academic Excellence* (National Institution of Education, 1983).

49. Eubanks & Lesine, *A First Look at Effective School Projects in New York and Milwaukee*, 64 *Phi Delta Kappan* 697 (1983).

istics are important in a system where many of the students transfer from one school to another during the course of a single year. Edmonds also called for the establishment of a mastery achievement level for all students and nonpromotion for those who fail to attain it.⁵⁰

In 1978, Edmonds put his ideas to work in a group of New York City schools. His work became known as the School Improvement Project (or SIP). Edmonds introduced uniform curriculum to combat the effects on achievement of a high rate of pupil mobility. He raised requirements for high school graduation, and changed the promotion policy to require the demonstration of a minimum academic mastery. He then established alternative classes for those who did not demonstrate mastery.

However positive such efforts at changing school expectations for students may seem, self-image improvement can have an impact on student achievement levels as great as, or greater than, government programs that spring from some transitory political interest in excellence in education.

In their report on Edmond's SIP, Clark and McCarthy found that from 1979 to 1982, the scores of SIP schools were higher than those of citywide schools.⁵¹ For example, they found the reading level of 15 SIP schools increased 6.3 percent from the spring of 1980 to the spring of 1981; for other city schools the reading level increased by only 3.8 percent.⁵²

After a quarter-century of litigation, the Houston public schools successfully desegregated without sacrificing academic excellence by establishing sixty-one magnet schools. Houston's Vanguard Program for the academically gifted begins in elementary school and continues through high school. Students are required to enroll in academic subjects, and receive extended instructional time to participate in parts of special mathematics and science programs. But magnet schools serve not only the gifted, but all other levels of educational ability as well.

In July of 1980, the Magnet School Task Force, 150 community and educational leaders, reviewed the entire concept for eight months. Its consensus was that the program had brought high-quality, integrated education to Houston. Enrollment and the length of waiting lists to enter the program have since continued to increase.⁵³ Moreover, the Tucson Unified School District has enjoyed similar success with its magnet school program.⁵⁴

Milwaukee has also undertaken to achieve academic excellence in twenty of its urban schools that serve predominantly low-income and

50. *On School Improvement: A Conversation with Ronald Edmonds*, 40 *Educ. Leadership* 13.

51. Clark & McCarthy, *School Improvement in New York City: The Evaluation of a Project*, 12 *Educ. Researcher* 17.

52. *Id.* at 22.

53. McIntire, Hughes & Say, *Houston's Successful Desegregation Plan*, 63 *Phi Delta Kappan* 536 (1982).

54. *Id.*

minority students. RISE (Rising to Individual Scholastic Excellence) is based on these eight goals:

- (1) the cultivation of the pervasive belief that all students can learn and that school is primarily responsible for their learning;
- (2) the development of a strong sense of academic mission;
- (3) the cultivation of a high level of professional collegiality among staff members;
- (4) the establishment of a strong sense of student identification with the school;
- (5) grade-level expectations and standards in the areas of reading, mathematics, and language;
- (6) The use of an accelerated learning program for students performing well below grade level;
- (7) an increase in the amount of time allocated, and actually used, for active student learning; and
- (8) the establishment of a structured learning environment.⁵⁵

As in SIP, the eighteen RISE schools have shown tremendous improvements: dramatic in mathematics and somewhat improved in reading. Eubanks and Levine (1983) evaluated both SIP and RISE, and reached conclusions similar to those reported by Clark and McCarthy.

Black and white high school graduates were equally likely to attend college in 1977. By 1982, 16 percent fewer blacks went on to college. The reason, according to the study, was poverty, pure and simple. Today the illiteracy rate for black Americans is approximately 44 percent. An examination of the public school dropout rate suggests that if achievement were measured by truancy, adolescent pregnancies, and dropout statistics, our schools would be a huge success. On the other hand, if one applies the traditional, generally agreed upon measures of success, one would have no choice but to consider education a failure.

Continued inaction and indecisiveness can only help increase the number of blacks who now question whether the desegregation of elementary and secondary schools has occurred or is even necessary. Thus, to "assume that mixing black and white children in schools and classrooms [will] magically provide quality education,"⁵⁶ is, in the current environment, unrealistic. As a result of changing demography, educators and the courts should no longer be willing to accept busing of the status quo as answers. They must resolve to do something that has not yet been done: develop nontraditional instructional programs within each community that build on the strength of the existing faculty and staff. The authors are convinced that if integration is to emerge from mere desegregation, our entire educational approach must be changed.

55. McCormack-Larkan & Kritek, *Milwaukee's Project RISE*, 40 Educ. Leadership 16.

56. Watson, *School Integration: Its Meaning, Costs and Future*, 4 J.L. & Educ. 15 (Jan. 1975).

Conclusion

What remains to be done is not more of the same but something wholly different. Despite dozens of judicial decisions, many complex issues remain to be resolved before educational equity becomes a reality for all. Yet the once-fervent mood of the country has cooled and hardened, and there is both disenchantment and ambivalence toward the more compassionate judicial rulings, school board policies, and practices of school district personnel.

The current mood of the country raises questions about whether the goal of ending racial segregation in public schools can even be reached through judicial intervention alone. The underlying factors that help nurture and reinforce segregation are still at work. If the future is to be better than the past, educators and judicial officials must focus their attention on strategies that encourage students to succeed academically in the segregated communities where they live. Also, approaches beyond busing must be examined and reexamined. Otherwise, the country will continue to make a lot of motion but little progress toward the elimination of racial segregation in public schools, and dynamic gradualism will continue to be the reality.

School Finance Reform Through Litigation: Expressway or Cul-de-sac?

Richard A. Rossmiller

Nearly twenty years have passed since scholars began to seriously suggest that school finance reform might be achieved through legal action. Over fifteen years have passed since the federal court handed down the *McInnis* and *Burris*¹ decisions. In these cases, the plaintiffs argued unsuccessfully that failure to allocate state aid in a manner which permits all children to have equal access to the educational programs constitutes a violation of the fourteenth amendment. The Supreme Court, in *Rodriguez*,² held that the equal protection clause of the fourteenth amendment was not violated by a state support program which permitted wide disparities to exist in the amount of revenue per pupil available among the school districts of the state. This decision effectively foreclosed attempts to achieve school finance reform on federal constitutional grounds.

Having failed in the federal courts, advocates of school finance reform turned to the state courts and sought to show that state constitutional provisions were violated by existing state support programs. These efforts were, of course, given considerable impetus by the success achieved in California in the *Serrano*³ case. The results at the state level have been rather mixed. Existing state support programs have been found unconstitutional in several states. They have been ruled constitutional in several other states, and are still in doubt in states where cases have not yet been decided by the highest court.

Major Legal Arguments

Although the Supreme Court ruled that the equal protection clause of the fourteenth amendment does not prohibit unequal spending among the school districts of a state, the equal protection provisions of state

1. *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd*, 394 U.S. 322 (1969); *Burris v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970).

2. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

3. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

constitutions frequently have been at issue in the state school finance cases. A second major focus in these cases has been on the specific wording of a state's constitutional provisions concerning public education.

Equal Protection Arguments

State school finance cases typically have followed the trail blazed in *Serrano*. They have asserted that an equal protection clause in the state's constitution is violated by a school finance system which makes the amount of revenue per pupil in individual districts a function of the wealth of the district rather than the wealth of the entire state. The major countervailing argument has been centered around the importance of local control, i.e., that local control is a prime objective of state policy and that substantial local responsibility for financing education is necessary to effectuate local control of public education.

Whether or not the local control argument will prevail depends upon whether a court finds that the state constitutional provisions for education create a "fundamental interest" in education, thus subjecting the state's arrangements for providing and financing education to stricter scrutiny than would otherwise be required. In *Serrano*, for example, the California Supreme Court found education to be of fundamental interest for the following reasons:

First, education is essential in maintaining what several commentators have termed "free enterprise democracy" — that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. . . . Second, education is universally relevant. . . . Third, public education continues over a lengthy period of life — between 10 and 13 years. . . . Fourth, education is unmatched in the extent to which it molds the personality of the youth of society. . . . Finally, education is so important that the state has made it compulsory — not only in the requirement of attendance but also by assignment to a particular district and school.⁴

The specific wording of state constitutional provisions also is important. For example, the Washington Constitution (article IX, section 1) declares, "It is the paramount duty of the state to make ample provisions for the education of all children residing within its borders. . . ." The Supreme Court of Washington stated that by "imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State's borders, the constitution has created a 'duty' that is supreme, preeminent or dominant" and therefore the court concluded, "all children residing within the borders of the state possess a 'right' arising from the constitutional imposed 'duty' of the State, to have the State make ample provision for their education.

4. *Serrano v. Priest*, 487 P2d 1241 (Cal. 1971).

Further, since the 'duty' is characterized as *paramount* the correlative 'right' has equal stature."⁵

Among the states in which education has been ruled to be a fundamental interest are California,⁶ Connecticut,⁷ Washington,⁸ Wyoming,⁹ and Arkansas.¹⁰ In general, where state school finance systems have been held unconstitutional, the court has determined that the state constitution's equal protection clause is applicable and thus equal education opportunities must be provided to students throughout the state.

Defendants in state school finance cases typically have asserted that the state's interest in retaining a degree of local control in the field of education provides a rational basis for the state's school financing arrangements. This defense has proven successful in those states where the equal protection provisions of the state constitution have not been held to make education a fundamental interest. If education is not a fundamental interest, then only a rational basis between the objectives of the state and the state's financing arrangements need be shown.

It appears that in recent years courts have become less inclined to rule that education is a fundamental interest. In New York's state school finance case,¹¹ the Court of Appeals of New York ruled that the rational basis test was the proper standard for review. It noted that stricter scrutiny is appropriate when intentional discrimination against a class of *persons* is claimed, but the claim of discrimination in the case before them was between property-poor and property-wealthy school districts. The court found no authority to support a claim that discrimination between units of local government would call for other than rational basis scrutiny.

The Court of Appeals of Maryland, which ruled that state's school finance system was constitutional, noted that Maryland's constitution either explicitly or implicitly guarantees rights that could in no way be considered fundamental and said:

The right to an adequate education in Maryland is no more fundamental than the right to personal security, to fire protection, to welfare subsidies, to health care or like governmental services; accordingly, strict scrutiny is not the proper standard of review of the Maryland system of financing its public schools.¹²

The court further noted that even if education were deemed a fundamental right, strict scrutiny would be appropriate only if a significant deprivation of that right occurred.

5. *Seattle School Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

6. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

7. *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977).

8. *Seattle School Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

9. *Washakie County School Dist. No. 1 v. Herschler*, 600 P.2d 310 (Wyo. 1980).

10. *DuPree v. Alma School Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983).

11. *Board of Educ. Levittown Union Free School Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982).

12. *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983).

Among the states in which it has been held that education is not a fundamental interest are Idaho,¹³ Oregon,¹⁴ Ohio,¹⁵ New York,¹⁶ Georgia,¹⁷ Colorado,¹⁸ and Maryland.¹⁹ In the absence of a requirement that the strict scrutiny test be applied, the state's interest in maintaining local control has been found to constitute a rational basis for organizing and financing education within a state despite the fact that disparities in per pupil spending exist among the state's school districts.

Constitutional Provisions for Education

A second major source of argument in the state school finance cases has been the wording of state constitutional provisions concerning the establishment of public schools. State constitutional provisions frequently are rather vague. Typically, they require that the state establish a "thorough and efficient" system of public schools, or a "uniform and general" system of schools, or a "complete and uniform system of public instruction." The operational meaning of these terms is not always clear and courts have differed in their interpretation of the meaning of such provisions.

The landmark case in this area is *Robinson v. Cahill*,²⁰ New Jersey's constitution requires that the legislature establish a "thorough and efficient" educational system. Although the court did not attempt a precise definition of the meaning of "thorough and efficient," it did determine that New Jersey's school finance system was unconstitutional because it failed to provide a thorough and efficient education.

Perhaps the most comprehensive definition of the characteristics of a "thorough and efficient" system of schools was provided by the Supreme Court of Appeals of West Virginia. It stated that a "thorough and efficient" system of schools

develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own gover-

13. *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975).

14. *Olsen v. State*, 554 P.2d 139 (Or. 1976).

15. *Board of Educ. of the City School Dist. of Cincinnati v. Walter*, 309 N.E.2d 819 (Ohio 1979).

16. *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982).

17. *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).

18. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982).

19. *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983).

20. *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

nance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interest in all creative arts, such as music, theater, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and monitor pupil, teacher and administrative competency.²¹

It is important to note that when courts are required to determine the meaning of a phrase such as "thorough and efficient" contained in a state's constitution, they will attempt to determine the intent of the framers of the constitution. The Court of Appeals of Maryland, for example, undertook a detailed review of the history of that state's constitutional provisions concerning public education and concluded that the words "thorough and efficient," considered in historical context, were not the equivalent of "uniform." The court stated:

Nor do these words impose upon the legislature any directive, in its establishment of the public school system, to so fund and operate it that the same amounts of money must be allocated and spent, per pupil, in every school district in Maryland. To conclude that a "thorough and efficient" system... means a full, complete and effective educational system throughout the State, as the trial judge held, is not to require a statewide system which provides more than a basic or adequate education to the State's children. The development of the statewide system... is a matter for legislative determination; at most, the legislature is commanded... to establish such a system, effective in all school districts, as will provide the State's youth with a basic public school education.²²

The Supreme Court of Colorado has interpreted the "thorough and uniform" requirement of that state's constitution. The plaintiffs argued that this clause requires the state to provide equal educational opportunity to all children. The court disagreed, however, ruling that the constitutional requirement "is satisfied if thorough and uniform educational opportunities are available through state action in each school district... this constitutional provision does not prevent a local school district from providing additional educational opportunities beyond this standard. In short, the requirement of a 'thorough and uniform system of free public schools' does not require that educational expenditures per pupil in every school district be identical."²³

21. *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

22. *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983).

23. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982).

State school finance systems in three states — New Jersey,²⁴ Washington,²⁵ and West Virginia²⁶ — have been ruled unconstitutional for failure to comply with state constitutional requirements. In at least five states — Oregon,²⁷ Pennsylvania,²⁸ Ohio,²⁹ Colorado,³⁰ and Maryland³¹ state support programs have been found to be in compliance with a state constitution requiring a “thorough and efficient” or “thorough and uniform” system of education.

Educational Need

Plaintiffs in both *McInnis*³² and *Burriss*³³ argued that the educational needs of students should be an important criterion in the allocation of state aid to school districts. The argument was unsuccessful, not because the courts involved were unwilling to recognize that the needs of individual students differ but because of their inability to identify manageable standards which could be used to assess differences in needs and the fiscal implication of such differences. As stated by the court:

[T]he courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the state. We can only see to it that the outlays on one group are not invidiously greater or less than that of another.³⁴

Although educational need has not been the central issue in recent state school finance cases, differences in the needs, and the cost associated with meeting these needs, have been among the issues raised. Perhaps the clearest explication of differing educational needs and costs is to be found in the New York school finance case. Several large school districts argued that they suffered from “educational overburden” because a high percentage of their students required more costly educational programs, and that the state school finance program was inequitable because it did not adequately recognize and compensate them for the high cost of educating these students. The trial court found their argument persuasive and ruled that the failure of the state school finance program to take adequate account of these needs and costs violated the

24. *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

25. *Seattle School Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

26. *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

27. *Olsen v. State*, 554 P.2d 139 (Or. 1976).

28. *Danson v. Casey*, 382 A.2d 1238 (Pa. 1978).

29. *Board of Educ. of the City School Dist. of Cincinnati v. Walter*, 309 N.E.2d 819 (Ohio 1979).

30. *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982).

31. *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983).

32. *McInnis v. Shapiro*, 293 F. Supp. 327 (Ill. 1968), *aff'd* 394 U.S. 322 (1969).

33. *Burriss v. Wilkerson*, 310 F. Supp. 572 (Va. 1969), *aff'd*, 397 U.S. 44 (1970).

34. *Id.*

equal protection clause of New York's Constitution.³⁵ The trial court's decision was upheld (in part) by the intermediate court of appeal³⁶ but reversed by the Court of Appeals of New York.³⁷ The court of appeals specifically rejected the claim that educational overburden in cities must be remedied by a compensating increase in state aid and said it was beyond the power of the court to determine whether budgets had been divided fairly between competing municipal services, or whether the available funds had been used wisely by local school boards.

Although the issue of educational needs has been raised either explicitly or implicitly in some of the state school finance cases, to date no state school finance program has been declared unconstitutional for failure to consider the varying educational needs of students (and the cost of meeting such needs) in the allocation of state aid to local school districts.

Legal Remedies

It is quite understandable that plaintiffs who have successfully challenged the constitutionality of a state school finance plan may eventually conclude their victory was somewhat hollow. While a court may declare a school finance plan unconstitutional, the court will not devise and impose a new school finance plan. Rather, it is up to the legislative and executive branches of state government to devise and enact a plan which meets the constitutional requirements. In effect, the judicial branch tells the other two branches: "The present plan is unconstitutional. It's up to you to come up with a plan that is constitutional."

The saga of *Robinson v. Cahill* is instructive. In 1973 the New Jersey Supreme Court upheld a trial court decision that New Jersey's school finance system violated the state's constitutional mandate to provide a "thorough and efficient" education.³⁸ In a supplemental opinion the state was given until December 31, 1974, to bring its school finance program into conformity with the constitutional requirement. This deadline passed without affirmative action. The plaintiffs then returned to the New Jersey Supreme Court requesting equitable relief. In May, 1975, the court ordered provisional relief only for the 1976-77 school year. The court's order provided that in the absence of legislative initiative to reform the state school finance program, "minimal support aid" and "save harmless aid" were to be dispersed in accordance with the incentive equalization formula contained in the 1970 school aid act. In stating its rationale for limited action, the court said:

35. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 408 N.Y.S.2d 606 (N.Y. App. Div. 1978).

36. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 443 N.Y.S.2d 841 (N.Y. App. Div. 1981).

37. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982).

38. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

We do not now go further for several reasons. We continue to be hesitant in our intrusion into the legislative process, forced only so far as demonstrably required to meet the constitutional exigency. As well, it would be premature and inappropriate for the Court at the present posture of this complex matter to undertake, *a priori*, a comprehensive blueprint for "thorough and efficient" education, and seek to impose it upon the other Branches of government. Courts customarily forbear the specification of legislative detail, as distinguished from their obligation to judge the constitutionality thereof, until promulgation by the appropriate authority.... There is no responsible dissent from the view that implementation of the constitutional command is peculiarly a matter for the judgment of the Legislature and the expertise of the Executive Department. In other words, the Court's function is to appraise compliance with the Constitution, not to legislate an educational system, at least if that can in any way be avoided.³⁹

In January, 1976 the court reviewed a new plan passed by the New Jersey legislature and found it constitutional.⁴⁰ The court retained jurisdiction, however, awaiting the funding of the plan by the legislature. When the funding did not materialize, the court briefly closed all New Jersey's public schools during the summer session pending funding of the court-approved or any other constitutional plan. When funding was finally provided, the court dissolved its injunction.⁴¹

The California Supreme Court in *Serrano II*⁴² (affirmed the trial court decision holding the state school finance program unconstitutional) identified several acceptable alternatives for the legislature's consideration. They included (1) full state funding with a statewide property tax; (2) consolidation of California's 1,067 school districts into 500, realigned so as to equalize the assessed valuation in each; (3) retention of present district boundaries, but taxation of all commercial and industrial property at the state level; (4) a district power-equalizing formula insuring that the same tax effort by any two districts would produce the same expenditure per pupil; and (5) an education voucher system. Ironically, it is generally agreed that passage of Proposition 13 did more to equalize school spending in California than any of the legislative actions taken in response to the decision in *Serrano*.

In summary, when the plaintiffs in a school finance case are successful in having the existing program declared unconstitutional, they win the right to go back to the legislative body that adopted the unconstitutional program in the first place and try to convince it to enact a program that meets the constitutional test. The typical response by state legislatures has been to make relatively modest changes in the existing program. The plaintiffs then must return to the courts to determine whether the revised program is constitutional. If the revised program is again ruled

39. *Robinson v. Cahill*, 339 A.2d 193 (N.J. 1975).

40. *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976).

41. *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976).

42. *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976).

unconstitutional, the plaintiffs must go back to the legislature and try again. Thus, victory in a school finance case may indeed be a Pyrrhic victory.

Conclusions and Implications

The results of this analysis of state school finance cases leads one to conclude that litigation has not been a notably successful means for achieving school finance reform. Legal action is costly, time-consuming, and generally has been rather ineffective in achieving significant reform in state school finance programs. Even in states where litigation has been successful, the amount of reform achieved has not been startling.

On the other hand, perhaps litigation, or the threat of litigation, may have helped produce school finance reforms that would not otherwise have been possible. One is tempted to observe that legislative bodies are more inclined toward significant reform during the period of time between when a case is filed and when it is decided. Perhaps this reflects a very human response on the part of legislative bodies. That is, they wish to avoid having a major state program ruled unconstitutional but once such a ruling is handed down, they are likely to "dig in their heels" and make only minimal changes. Thus, it might be good strategy for plaintiffs to delay a decision in a school finance case as long as possible in the hope that state legislative and executive branches will be more amenable to change before the case is decided.

State school finance cases involve interpretation of a state's constitutional provisions and the courts will seek to determine the intent of the framers of the constitution when they used a particular word or phrase. Words such as "thorough and efficient" do not have an identical meaning from one state to another. Their meaning is determined by the intent of the framers of the constitution insofar as that intent can be ascertained. Thus a school finance program which would be constitutional in one state may be ruled unconstitutional in another state.

Equal protection arguments are successful if the plaintiffs are able to persuade the court that the wording of the state constitution gives education a privileged status, that is, that education is a fundamental interest. The state's interest in promoting local control of education generally will not survive the strict scrutiny test required when education is determined to be a fundamental interest. Where education is found not to be a fundamental interest and the rational basis test is applied, the local control argument generally has been persuasive. In state school finance cases decided in recent years there has been a tendency to apply a rational basis rather than a strict scrutiny test and plaintiffs are not likely to be successful when a rational basis test is applied. Educational need has not been accepted as an essential criterion for the distribution of state aid, primarily because the courts have been unable to identify manageable standards for measuring the fiscal implications of such needs.

Clearly, litigation has been neither the expressway to school finance reform, nor has it been a cul-de-sac. Litigation undoubtedly has been useful in drawing attention to disparities and inequities within current systems of school finance. Thus, litigation may be an important factor in securing school finance reform even where the case itself is unsuccessful. Unfortunately, legal action is costly and time-consuming, and may not be as cost-effective as direct political action. This suggests that litigation should be considered a weapon of "last resort" in the struggle for school finance reform and that it should be used in conjunction with other efforts to achieve direct action by the legislative and executive branches of government.

16

Responding to Child Abuse: Critical Issues for Educators and Their Counsel

John E.B. Myers
B. Glen Epley
Paul G. Nakauae

As many as one million American children are physically abused or neglected each year.¹ The number victimized by sexual abuse may be as high as 500,000.² The majority of these youngsters are of school age,³ and the depressingly large number of abused and neglected children attending school raises serious and pressing questions for teachers, administrators, and school boards. Do the schools have a duty to detect abuse and neglect? When the problem surfaces, what should be done in response? What liability issues lurk beneath the schools' response or lack thereof? And finally, what techniques can be employed by educators to aid law enforcement and child protection officials in their efforts to curb child maltreatment? In an effort to shed light on these difficult questions, this chapter begins by defining the terms physical and sexual abuse and neglect. Then, it outlines the statutory duty of educators to report abuse and neglect to appropriate authorities. This is followed by discussion of liability for failure to take appropriate action. Finally, the last section discusses crucial evidentiary issues in child abuse litigation and techniques which can be employed in the schools to ensure that valuable evidence is not lost. Child abuse and neglect cannot be ignored, and the schools have a vital role to play in the social response to this serious and destructive social problem.

1. American Humane Association, *Trends in Child Abuse and Neglect: A National Perspective* 13 (1984) [hereinafter cited as *National Perspective*]. The foregoing report indicates that 12% of reported cases of child abuse and neglect are reported by schools.

2. It is extremely difficult to determine the incidence of sexual abuse. The abusive adult is careful to preserve secrecy, and in most cases there are no physical injuries requiring medical attention. For general information on incidence of sexual abuse see National Center on Child Abuse and Neglect, *Child Sex Abuse: Incest, Assault and Sexual Exploitation* 2 (1981) (estimating more than 100,000 cases of sexual abuse annually); Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52 *Child Welfare* 147, 148 (1973) (estimating as many as 500,000 cases per year); Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 *Abuse and Neglect* 133 (1983).

3. See *National Perspective*, *supra* note 1, at 22.

Defining Abuse and Neglect

States vary considerably in defining child abuse and neglect. Some statutes are phrased in expansive language which permits intervention in a broad range of circumstances, while others are narrowly tailored to discourage unwarranted governmental intrusion in family affairs.⁴ While the nuances defy neat categorization, it is possible to cull certain common features from the statutes.⁵

- Physical abuse is usually defined as physical harm, or the imminent threat thereof, inflicted by non-accidental means. The abuser must act or fail to act with a specified mental state such as intent or culpable, criminal, or gross negligence.
- Sexual abuse is usually defined with reference to criminal statutes prohibiting specific acts such as incest, sexual molestation, unlawful sexual intercourse, sodomy, and rape.
- Neglect is a broad term embracing such things as abandonment, failure to provide basic necessities, lack of proper parental care or control, and exposure to depravity. The concept of neglect usually includes an element of parental fault or culpable negligence.
- Psychological abuse or neglect encompasses intentional or negligently inflicted psychological injury. Some states define this form of maltreatment in broad terms, while others define it narrowly in an effort to avoid inappropriate intervention in family privacy. One of the basic distinctions between the "broad" and "narrow" states is that jurisdictions following the former view permit intervention to prevent threatened psychological harm, while states adhering to the latter philosophy permit intervention only when a child is *actually suffering* psychiatric symptoms.⁶
- Medical neglect describes parental failure to provide a child with necessary medical care. When treatment is needed to save a child's life, court's uniformly approve state imposed medical care administered over parental objection.⁷ When parents refuse to provide medical care that is needed by a child but which is not necessary to preserve the child's life, court decisions split. Depending on the facts of individual cases, courts sometimes authorize medical care over parental objection in non-life threatening situations.⁸

4. There is currently a lively debate among those interested in the authority of the state to intervene in the family to prevent abuse and neglect. Numerous commentators take the position that state authority must be narrowly confined so as to deter unwarranted intervention into family privacy. See J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* (1979); Institute of Judicial Administration, American Bar Association, *Juvenile Justice Standards—Abuse and Neglect* (1980).

5. See generally, Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 Fam. L. Q. 1 (1975).

6. There is substantial disagreement concerning whether the state should be authorized to intervene in the family to prevent psychological neglect or abuse.

7. *Custody of a Minor*, 379 N.E. 2d 1053, 1052 (1978). See generally, Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 *Duquesne L. Rev.* 1, 32-52 (1984).

8. *In re Sampson*, 317 N.Y.S. 2d 641 (N.Y. Fam. Ct. 1970), *aff'd*, 323 N.Y.S. 2d 253 (N.Y. App. Term 1971), *aff'd*, 328 N.Y.S. 2d 686 (1972); *In re Jensen*, 633 P. 2d 1302 (Or. Ct. App. 1981).

- Dependency is a term occasionally employed in child abuse and neglect statutes to describe cases in which a child's needs are not met, but in which the parents are not at fault. Examples include situations where parents are mentally or physically incapacitated and unable to care for their children, and circumstances in which parental poverty precludes the ability to provide basic necessities.⁹

Child Abuse Reporting Statutes

In 1962 the Children's Division of the American Humane Association conducted one of the first studies to determine the incidence of child abuse. The investigation relied on newspaper reports because at that time states did not require reporting of child abuse and neglect. The study disclosed "[s]ix hundred and sixty-two cases of child abuse . . . in 48 states and the District of Columbia."¹⁰ It was also in 1962 that Dr. C. Henry Kempe and his colleagues published their seminal article describing the battered child syndrome.¹¹ The work of Dr. Kempe and others fueled the growing concern about the hidden problem of child abuse, and, beginning with California in 1963, states quickly responded by enacting statutes requiring professionals to report known or suspected child abuse and neglect to law enforcement or social services workers. By 1982 the number of reported cases rose to nearly one million.¹² The reporting laws brought the staggering pervasiveness of child maltreatment clearly into focus and generated unprecedented efforts to deal with the problem.

The details of child abuse reporting laws vary from state to state, although most jurisdictions follow a statutory scheme quite similar to the one outlined in this section. The statutes make reporting mandatory for a list of professionals who have contact with children and who

9. Critics of state intervention to prevent child abuse and neglect point out that intervention is usually carried out against the poor. The charge is made that such intervention is discriminatory. See Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stanford L. Rev. 985 (1975). Scientific research reveals, however, that abuse and neglect occur most frequently among the poorest of the poor. See *The Social Context of Child Abuse and Neglect* (L. Pelton ed. 1981). The fact that many abusive parents are poor, and that poor parents are more likely to come to the attention of child welfare officials, cannot curtail the state's authority to intervene when children are abused or neglected. Policy makers, including educators, must find ways to help families lift themselves out of poverty. But while they do so, the state must retain its authority to protect endangered children.

10. National Perspective, *supra* note 1, at 7.

11. Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome*, 181 A.M.A.J. 17 (1962).

12. National Perspective, *supra* note 1, at 13.

13. When the child abuse reporting statutes were first enacted, the physician was often the only professional required to report suspected abuse or neglect. As legislatures amended reporting statutes, they added other professionals to the list of mandated reporters. In most states today, the reporting statutes take a laundry list approach; listing a wide array of professionals who come into contact with children. See Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 George Washington L. Rev. 243, 256-59 (1982) [hereinafter cited as Note, *State Child Abuse Statutes*].

acquire information which puts them on notice that a child may be abused or neglected.¹³ *Nearly all states expressly name teachers and other school personnel among those required to report suspected abuse or neglect.*¹⁴

The reporting requirement is triggered when a person required to report, often called a "mandated reporter," possesses the prescribed degree of knowledge about a particular child. The terms used to describe the requisite level of knowledge vary from state to state, with commonly employed language including "cause to believe," "reasonable cause to believe," "known or suspected abuse," and "observation or examination which discloses evidence of abuse." Despite the differences in terminology, the basic thrust of the reporting statutes is the same—to require reporting by individuals possessing knowledge that a child may be suffering from abuse or neglect. It is important to point out that the individual need not "know" that a child is abused or neglected. All that is required is factual knowledge which raises a reasonable suspicion of maltreatment.¹⁵ If a mandated reporter failed to report until he or she knew to a certainty that abuse or neglect occurred, the reporting statute would likely be violated. The decision about whether abuse has actually occurred is left to investigating officials, not to individuals required to report.

The variation in statutory language triggering the reporting requirement raises questions about whether the requisite degree of knowledge is measured by an objective or a subjective standard. In other words, is the subjective knowledge of the reporter the decisive factor or is the reporting responsibility triggered by an objective, "reasonable person" standard? The answer may have an important impact on liability for failure to report. Unfortunately, there is a dearth of case law interpreting the reporting statutes, and it is unclear how courts will construe particular statutory language. Statutes which use words such as "rea-

14. A review of the reporting statutes discloses that nearly all jurisdictions list educators among those required to report suspected abuse. Oklahoma may be an exception to the general rule. The reporting statute in that jurisdiction appears to be limited to medical professionals. See Okla. Stat. Ann. § 846 (West 1983). In a small number of states the statutes state that "any person" with the level of knowledge needed to trigger the reporting requirement must report. See, e.g., Utah Code Ann. § 78-3b-3 (1985 Pocket Part). See also, Oregon, Rhode Island, Tennessee, Texas and Wyoming.

15. See Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 Chicago-Kent L. Rev. 641, 659-60 (1977-78) [hereinafter cited as Fraser]. The reporting requirement is triggered by something less than probable cause as that term is employed elsewhere in the law. The case of *Roman v. Appleby*, 558 F. Supp. 449, 459 (E.D. Pa. 1983) is instructive on this point. The litigation was a 1983 action against a school counselor who reported suspected neglect to child protective service authorities. The child's parents argued, unsuccessfully, that the report invaded their constitutionally protected rights. The court interpreted the Pennsylvania reporting statute, and remarked that "[T]he Child Protective Services Law does not require that the individual making a report 'have probable cause' to believe a child is 'deprived.' A lesser quantum of evidence is sufficient, i.e., a person must have 'reason to believe... that a child coming before them... is an abused child.'"

sonable cause to believe" probably denote an objective standard, while words such as "know" and "suspect" may be interpreted to require proof of subjective knowledge. The objective standard is viewed as the better argument, and adoption of such a standard makes proof of statutory violation reasonably possible and encourages maximum reporting — the *sine qua non* of the reporting statutes.

Starting from the position that educators are among the professionals required to report suspected child abuse, how sophisticated must the teacher or administrator be regarding the signs and symptoms of abuse and neglect? Certainly the law does not require educators to have the level of knowledge possessed by physicians, nurses, and child protective services workers. One commentator suggests that "a teacher would be required to report a suspected incident of child abuse only where a reasonably prudent schoolteacher would have reported."¹⁶ In other words, the level of knowledge is tailored to the professional involved. However, the fact that most educators have little or no medical training should not lead school districts to conclude that it is unnecessary to provide in-service training on the recognition and assessment of abuse and neglect. Quite the contrary is true. The relative lack of pertinent knowledge among educators actually strengthens the case for such training. Raising the level of sophistication is the best way to protect children from harm and the school district and its employees from liability.

When a person required to report abuse gains factual information about a child which is sufficient to trigger the reporting statute, the law requires the individual to make the required report *immediately*. The statutes brook no delay. The reason for this urgency is, of course, to enable appropriate officials to take prompt steps to protect children from further abuse. Most statutes call for an immediate oral report to be followed within a short period of time by a written report. The reporting statutes in effect in most jurisdictions permit the individual to file the report with law enforcement officials or with the social services agency charged with responsibility for protecting abused and neglected children. The initial report usually consists of basic factual information about the child and the alleged abuse.

In most states the reporting statutes impose the reporting responsibility directly on the professional who learns of suspected abuse.¹⁷ He or she is required to report to appropriate officials without delay. In some states, however, mandated reporters working under supervision are required or permitted to report suspected abuse to their supervisor, who, in turn, is required to notify appropriate law enforcement or child

16. Note, *Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse*, 28 Wayne L. Rev. 183, 195 n.73 (1981) [hereinafter cited as Note, *Civil Liability for Teachers*].

17. The statutes usually state that when a mandated professional has the requisite degree of knowledge of abuse or neglect, he or she must report immediately to the appropriate law enforcement or child protection authorities.

protection officials.¹⁸ School administrators and their counsel should consult local law to determine whether teachers are required to report suspected abuse directly, or whether the law permits procedures under which reports are made to supervisory personnel such as principals. In order to avoid confusion and reduce the potential for liability, school districts are well served when they formulate written procedures to be followed by all employees who are required to report suspected child abuse.

It is important for educators to realize that the reporting statutes do not permit the exercise of discretion concerning whether or not to report. *If the requisite triggering knowledge is present, the report must be made.* Educators, like other mandated reporters, sometimes feel that a report is unwarranted or that reporting suspected abuse or neglect will do more harm than good. Teachers or administrators may believe that the best course is to delay reporting in order to see whether the problem persists or whether it was an isolated incident. Educators may feel that they can deal effectively with the problem within the school system, and that bringing the police or social work professions into the picture will only complicate the situation and cause unnecessary disruption of the child's life. Finally, professionals may hesitate to report because they fear involvement in the legal system, because they believe they may be sued or disciplined, or because they believe reporting child abuse is not the proper role of educators. Whatever the reasons, some of which may be legitimate in individual cases, the law is clear that when mandated reporters possess the requisite level of knowledge, they *must* report. There are no exceptions, regardless of how logical or compelling the reasons may be. The statutory duty to report is satisfied only when the required report is made.

In order to protect confidential communication between individuals and certain professionals, the law erects privileges which can be invoked to prevent disclosure of confidential information. Examples include the physician-patient, psychotherapist-client, attorney-client, and husband-wife privileges. In the context of child abuse, a growing majority of states have amended their statutes so as to abrogate some or all of the traditional privileges.¹⁹ Under these amendments, professionals are required to report suspected child abuse despite the fact that they

18. See, e.g., Ark. Stat. Ann. § 42-807; Cal. Penal Code § 11165; Idaho Code § 16-1601; Kan. Stat. Ann. § 38-1501; Main Rev. Stat. Ann. tit. 22, § 4001; Md. Code Ann. § 5-901; Mass. Gen. Laws Ann. ch. 119, § 51A; Ohio Rev. Code Ann. § 2151.01; 11 Pa. Stat. Ann. § 2201; Va. Code § 63-1-248.1; W. Va. Code § 49-6A-1; Wyo. Stat. § 14-3-201.

If a school district implements a procedure under which teachers report to a supervisor such as a principal, it becomes necessary to determine whether the state reporting statute permits a mandated reporter to, in effect, delegate the reporting responsibility to someone else. Will the teacher remain liable if the principal fails to report and the child is further abused? This difficult question must be answered before implementing a procedure in a particular educational setting.

19. See Fraser, *supra* note 15, at 664-65; Note, *State Child Abuse Statutes*, *supra* note 13, at 266-67; Comment, *Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?*, 22 San Diego L. Rev. 645 (1985).

learned of the abuse through confidential communications. The abrogation of privileges for confidential communications extends to school psychologists and other school employees who would normally fall within a privilege.

Liability

Civil Liability for Failure to Report

Most child abuse reporting laws are silent regarding civil liability for failure to report abuse, although a few statutes expressly state that civil liability attaches when failure to report is the proximate cause of further abuse.²⁰ The potential for tort liability based on failure to detect maltreatment or failure to report suspected abuse is a genuine concern in the school setting, where there is sometimes resistance to the reporting requirement.

Tort liability for failure to report child abuse was first addressed in the landmark case of *Landeros v. Flood*,²¹ decided by the California Supreme Court in 1976. The case involved a medical malpractice action against Dr. Flood and his hospital employer. The plaintiff child sued through her guardian for injuries suffered at the hands of her mother and her mother's boyfriend. The complaint alleged that the doctor, who was working in the hospital emergency room, failed to diagnose the fact that the child was suffering from the battered child syndrome²² and failed to report her condition to proper authorities. Because the doctor failed to detect and report the abuse, the child was returned to her mother, where she was further abused. On a subsequent visit to a different emergency room, the attending physician immediately diagnosed battered child syndrome and reported the case to the authorities. The child's suit alleged that Dr. Flood's negligent failure to diagnose and report her abuse was the proximate cause of the subsequent injuries.

20. See statutes in Arkansas, Colorado, Minnesota (civil liability for false report), Montana, New York, and Rhode Island (liability for interference with a report).

21. 551 P. 2d 389 (Cal. 1976).

22. The battered child syndrome was originally described by Kempe and his colleagues in 1962 as follows:

The battered child syndrome may occur at any age, but, in general the affected children are younger than 3 years. In some instances the clinical manifestations are limited to those resulting from a single episode of trauma, but more often the child's general health is below par, and he shows evidence of neglect including poor skin hygiene, multiple soft tissue injuries, and malnutrition. One often obtains a history of previous episodes suggestive of parental neglect or trauma. A marked discrepancy between clinical findings and historical data as supplied by the parents is a major diagnostic feature of the battered-child syndrome....Subdural hematoma, with or without fracture of the skull is...an extremely frequent finding even in the absence of fractures of the long bones....The characteristic distribution of these multiple fractures and the observation that the lesions are in different stages of healing are of additional value in making the diagnosis.

Kempe, *supra* note 11, at 17.

The *Lauderos v. Flood* court held that the failure to detect and report child abuse can give rise to a cause of action based on the "[a]lternative theories of common law negligence and statutory liability...."²³ While *Lauderos* involved a physician, the identical theories can be employed against educators.²⁴ School personnel, like other mandated reporters, may be found liable on the basis of common law negligence. The elements of the negligence cause of action are described in *Prosser and Keeton on Torts*²⁵ as follows:

1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the person's part to conform to the standard required: a breach of the duty
3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
4. Actual loss or damage resulting to the interests of another ²⁶

In the context of child abuse reporting, the second and fourth elements of the negligence cause of action — breach of duty and damage — pose few problems for potential plaintiffs. The first and third elements, however, are somewhat problematic. Do educators owe a tort duty to students which is violated by failure to report? While the answer may vary from state to state, it is suggested that the great majority of courts would find a legal duty on the part of educators to protect abused and neglected children. The special relationship between educators and students has been held to impose an obligation on the former to safeguard the latter, and the inability of children to protect themselves supports the case for imposition of a duty to fulfill the statutory reporting obligation.²⁷

The third element of the negligence cause of action requires a finding that the defendant's conduct was the proximate or legal cause of the

23. 551 P. 2d at 396.

24. In *Lauderos v. Flood* the California Supreme Court stated in dicta that the liability imposed on physicians for failure to report suspected abuse extends to other professionals. The court wrote that: "The...reporting statutes...evidence a determination by the Legislature that in the event a physician does diagnose a battered child syndrome, due care includes a duty to report that fact to the authorities.... The same is true of each of the persons and entities covered by this legislation." 551 P. 2d at 394 n.8. The court goes on to remark that "school officials and teachers" have the same duty to report as that imposed on physicians. *Id.* at 395 n.5. See also Note, *Civil Liability for Teachers*, *supra* note 16. The non-legal literature contains relatively little about the duty of educators to report child abuse. Several articles which may be of interest to educators are: Beezer, *Reporting Child Abuse and Neglect: Your Responsibility and Your Protections*, 6 Phi Delta Kappan 434 (Feb. 1985); Roscoe, *The Educator's Role in Identification and Interaction with Abuse Victims*, 105(1) Education 82 (Fall 1984); Levin, *Teachers' Perceptions, Attitudes, and Reporting of Child Abuse/Neglect*, 62(1) Child Welfare 14 (Feb. 1983).

25. W. Keeton, *Prosser and Keeton on Torts* (1984).

26. *Id.* at 164-65.

27. *Id.* at 383.

plaintiff's injuries.²⁸ A teacher or school district being sued by a student could argue that the injuries inflicted by the parents were the work of third party tortfeasors, and that a defendant is not responsible for the illegal acts of such persons. This argument would probably fail, however, because the clear majority of courts hold that the foreseeable intervening acts of third parties do "not amount to a 'superseding cause' relieving the negligent defendant of liability."²⁹ Thus, it appears that under the rationale articulated in *Landeros v. Flood*, school personnel can be held liable for negligent failure to detect and report child abuse.

Perhaps the clearest case for liability for failure to report grows out of the tort doctrine which holds that the standard of care to which individuals must conform may be established by a statute which requires certain behavior. In *Prosser and Keeton on Torts*, the doctrine of liability based on violation of statute is described as follows:

The standard of conduct required of a reasonable person may be prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate.... The fact that such legislation is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability, and may even be a prerequisite thereto.

....

Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—and once its breach has been established, probably a majority of the courts hold that the issue of negligence is thereupon conclusively determined....³⁰

Failure to detect and report suspected child abuse fits within the formula for liability based on violation of statute. In fact, it would be difficult to imagine a case more appropriately suited to application of the doctrine. First, the reporting statutes are quite clear about what must be done and under what circumstances. Strong policy arguments, based on principles of child protection, can be mounted to persuade courts that the statutes establish the standard of care, and that failure to report is negligence. Second, the overriding purpose of the statutes is to prevent abuse, therefore, children are within the class of persons protected by the laws. Third, when failure to report abuse leads to further injury, the "requirement that the harm suffered must be of the kind which the statute was intended, in general, to prevent" is satisfied. Finally, failure to report constitutes a clear breach of the mandatory reporting require-

28. See *id.* at 272-80.

29. *Landeros v. Flood*, 551 P.2d at 395. See Restatement (Second) of Torts § 440; W. Keeton, Prosser and Keeton on Torts 303 (1984).

30. W. Keeton, *supra* note 25 at 220, 229-30.

ment. Thus, the potential for civil liability is present whenever educators fail to detect or report abuse.

In sum, the potential exposure to civil liability for failure to detect or report suspected child abuse is considerable. The time is ripe for in-service training designed to improve the ability of educators to detect abuse and neglect and to raise the level of knowledge about the reporting laws. The need for such training is substantiated by the results of research on the level of teacher knowledge about child abuse and the reporting requirement. In an article titled *Teachers' Perceptions, Attitudes, and Reporting of Child Abuse/Neglect*,³¹ Patricia G. Levin offers the following revealing observations:

Recent literature indicates that school personnel generally seriously underreport and often mishandle suspected child abuse and neglect because of failure to recognize the signs of abuse and failure to report suspected abuse to proper authorities. Lynch... estimated that reports covered only 1-10% of the actual occurrences. Others estimate that only one of 20 cases gets reported....

Why do educators fail to report child abuse and neglect? The research completed to date shows that schools are on the whole not prepared to deal adequately with the child abuse problem. Collucci... indicates that less than 5% of the nation's schools have working policies and procedures for reporting child abuse and neglect. Manley-Casimar and Newman... showed that many teachers do not know the symptoms of child abuse. Furthermore, those who suspect child abuse often do not want to get involved for fear of meddling with parents' right to discipline their children as they see fit.

....
[T]eachers [responding to a questionnaire] indicated relatively low levels of knowledge of child abuse symptoms and many teachers found the programs to teach personnel about child abuse to be inadequate.

It is clear from the research reported above that school administrators and their attorneys should take action to improve the education system's response to abuse and neglect. The beneficiaries of such training will be the schools, their students, and the community.

Before leaving the subject of liability premised on failure to report, it is important to dwell for a moment on the question of whether cases addressing the issue of educational malpractice are relevant to the liability discussed in this subsection. The handful of appellate decisions discussing the concept of educational malpractice refuse to recognize such a cause of action.³² The courts reason that it would be difficult or

31. Levin, *Teachers' Perceptions, Attitudes, and Reporting of Child Abuse/Neglect*, 62(1) Child Welfare 14, 15, 19 (Feb. 1983).

32. See, e.g., *Peter W. v. San Francisco Unified School Dist.*, 131 Cal. Rptr. 854 (Cal. Ct. App. 1976). See also, *W. Keeton, Prosser and Keeton on Torts* 1048-49 (1984), where the author observes that "the 'educational malpractice' claims, based on a school's failure to teach, test or counsel a pupil adequately, with resulting emotional or intellectual harm, have been denied for reasons sometimes similar to those involved in the discretionary immunity." E. Reutter, *The Law of Public Education* 165-66 (3d ed. 1985).

impossible to define the legal duty which is an element of a malpractice cause of action. Additionally, they state that recognition of educational malpractice would be against sound public policy.

Could an educator or school district successfully argue that the educational malpractice cases govern litigation on the question of failure to report child abuse, thus ruling out liability? Probably not. In the child abuse reporting area the clear public policy is to support maximum reporting and to penalize those who violate the reporting duty. This important public policy will be furthered by imposing civil liability on those who fail to detect and report abuse. Furthermore, the duty issue which causes so much difficulty in the malpractice context does not pose a substantial problem when it comes to reporting. The duty to report is straightforward and clearly defined. A significant body of case law already holds schools to a duty to protect the physical safety of students, and these cases can be employed to bolster the argument for liability. Finally, imposition of liability will not interfere with the smooth functioning of the schools or with the planning and implementation of academic programs. For the foregoing reasons, it is reasonably safe to conclude that the educational malpractice cases will not provide succor to defendants enmeshed reporting litigation.

Criminal Liability for Failure to Report

Most child abuse reporting statutes state that willful failure to report child abuse is a misdemeanor. The authors were unable to locate any appellate decisions dealing with criminal action against educators for failure to report. As prosecutors step up their efforts against child maltreatment, additional prosecutions can be expected.

A story carried in the *Los Angeles Times* on July 13, 1984 describes the prosecution of a teacher.³³ The story is worth repeating to make the point that criminal action is a possibility that must not be ignored:

A criminal complaint has been issued against a Claremont elementary school teacher accused of failing to inform police about the case of an 8-year-old girl who told of being fondled on school grounds by a 12-year-old boy.

[Defendant], 40, a third-grade teacher at Sycamore Elementary School, faces a misdemeanor charge under a little-used law for failing to report an occurrence of child abuse or sexual assault to authorities.

The complaint was filed last Friday by the district attorney's office in Pomona Municipal Court. [Defendant], who has been on vacation, was expected to turn herself in today.

....

The alleged act of sexual intercourse was said to have occurred in May or June.

[T]he girl had told [Defendant] earlier this year, but some time before the alleged intercourse, that she had been fondled. The teacher told the girl to discuss the fondling encounters with her mother....

33. *Los Angeles Times*, July 13, 1984 at § 11, 8, col. 3.

According to police reports... the teacher also consulted the school psychologist after the girl's disclosure for advice about how to deal with the problem.

[Defendant] reportedly told police that she did not inform law enforcement authorities because of the "confidentiality" that she believed existed between herself and the pupil.

The psychologist... told police that she advised [Defendant] to keep the confidence because the incidents appeared to be nothing more than "kids playing."

The case from Sycamore Elementary is a tragic example of the mistakes made every day by well-intentioned but uninformed educators. One can only imagine the anguish experienced by a dedicated teacher who is arrested on criminal charges and forced to endure the cruel gauntlet of the criminal justice system. Surely this case is convincing evidence of the pressing need for in-service training on the recognition and assessment of child abuse and the duty to report.

Other Potential Liability

Child abuse reporting statutes establish procedures which permit professionals such as police officers, physicians, and social workers to take children into emergency protective custody. Such action is sometimes necessary to protect a child during the time needed to secure a protective order from the juvenile court. The reporting statutes do not extend this emergency authority to educators, and this fact raises a question about the proper course of action when a child would be in immediate danger if returned to a parent or other adult. Retaining custody of the child could lead to liability for false imprisonment, therefore, the most attractive alternative is usually emergency law enforcement assistance.

School districts and school board members could find themselves subject to liability for failure to provide in-service training on the recognition and assessment of child abuse and neglect and on the statutory duty to report suspected maltreatment to appropriate authorities.

Liability for failure to report suspected child abuse is a realistic possibility, but legal exposure for nonfeasance is not the only danger. Educators and their counsel must also prepare to meet allegations of unwarranted reporting when action is taken pursuant to the reporting statutes. The case of *Roman v. Appleby*³⁴ is a good example of the dangers lurking in good-faith efforts to comply with the reporting laws. The defendant in this federal court action was a high school guidance counselor. The counselor conducted several interviews with a student and determined that the young man had serious psychological problems. After the parents declined to provide a psychiatric evaluation for the boy, the counselor reported the matter to child protective services. Social workers investigated the case and filed a petition in juvenile court

34. 558 F. Supp. 449 (E.D. Pa. 1983).

seeking authorization to provide psychiatric care for the child. In response, the parents filed an action under 42 U.S.C. section 1983 seeking relief for alleged violations of the first amendment free exercise clause, the constitutional right to family privacy, fourteenth amendment due process, and the equal protection clause.³⁵ They also sought recovery for pendent state claims based on negligence, intentional infliction of emotional distress, and invasion of privacy.

The district court granted defendant's motion for summary judgment, holding that the counselor was protected from liability by good faith immunity and by the statutory immunity granted individuals reporting suspected child abuse. While the outcome of the *Roman* case was favorable for the counselor, the decision illustrates the importance of training school employees in how to evaluate suspected abuse so that inappropriate reporting is avoided. As is true with most activities carrying a risk of litigation, liability can follow too much as well as too little action.

Defenses

When the spectre of litigation arises from either a failure to report child abuse or an allegation of unwarranted reporting, school districts, administrators, and teachers can avail themselves of a panoply of defenses. In addition to the routine tort defenses, educators can rely on several types of qualified immunity. This section contains a cursory discussion of the immunities.³⁶

As entities of government, some school districts may be protected by governmental immunity. Most jurisdictions have abolished such immunity in the tort context, however, and the defense is usually not available. Furthermore, courts have shown solicitous concern for children injured through the negligence of state or other public employees, and the doctrine of governmental immunity has seldom barred recovery.³⁷

Public officers are sometimes "immune from liability for acts within the scope of [their] official duties."³⁸ Immunity is absolute or qualified depending on the official involved and the circumstances of the case. Except in unusual situations, educators enjoy only qualified immunity. Most jurisdictions extend immunity for discretionary acts, but not for acts which are ministerial.³⁹ Needless to say, drawing the line between

35. For an excellent treatment of 42 U.S.C. § 1983, see generally S. Nahmod, *Civil Rights and Civil Liberties Litigation* (1979).

36. For in-depth discussion of immunity, see W. Keeton, Prouser and Keeton on Torts 1032-49 (1984); S. Nahmod, *Civil Rights and Civil Liberties Litigation*, chs. 7 & 8 (1979); E. Breutter, *The Law of Public Education*, ch. 7 (3d ed. 1962).

37. See W. Keeton, Prouser and Keeton on Torts 1045 (1984), where the author states that "[c]hildren in the state's custody have also engendered judicial concern.... School ground injuries resulting from negligently maintained or supervised premises or similar causes usually involve no issue of discretion at all and again, where sovereign immunity is abolished, liability is imposed or denied under general negligence principles."

38. *Id.* at 1036.

39. For in-depth discussion of immunity, see authorities cited in footnote 36.

discretionary and ministerial acts is no easy task, and cases turn on their unique facts. While it is not possible to assert with certainty how a court would view failure to report child abuse, it is suggested that judges would probably come down on the ministerial side of the line. This position finds support in a body of cases denying immunity for conduct such as negligent medical treatment, false imprisonment, injury to people in official custody, and other tortious behavior.⁴⁰ When these cases are considered in light of the fact that the reporting statutes remove discretion from those required to report, the case against immunity becomes convincing. In the absence of a statute granting protection from suit, educators are probably not entitled to common law immunity when sued for failure to report.⁴¹

Plaintiffs frequently seek to commence litigation in the federal forum by alleging constitutional or federal statutory violations by state officials or employees. This is, of course, the ubiquitous 1983 action.⁴² The United States Supreme Court "has read the common law immunities, or something very close to them, into the civil rights statutes. Thus... state officers enjoy...[a] qualified immunity" for the performance of discretionary functions.⁴³ As was true with state immunity, however, a federal court could well decide that immunity does not extend to failure to report suspected abuse.

In addition to common law qualified immunity, the reporting statutes themselves extend broad immunity to individuals who report suspected abuse.⁴⁴ One commentator describes this statutory immunity as follows:

To encourage reporting and other supportive intervention, all states protect mandatory and premissive reporters from potential civil or criminal liability. The immunity usually protects from legal attack all acts required or permitted within the statute, including reporting, taking pictures or x-rays, participating in a judicial hearing on the alleged abuse or neglect, and placing in or assuming temporary protec-

40. See W. Keeton, Prosser and Keeton on Torts 1062 (1984).

41. *But see*, Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983), where the court dismissed a suit against a school counselor on the ground that, *inter alia*, she was entitled to qualified immunity for her decision to report suspected psychological neglect to child protection authorities.

42. 42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." For in-depth discussion of section 1983, *see generally* C. Antieau, Federal Civil Rights Acts (1980); S. Nahmod, Civil Rights and Civil Liberties Litigation (1979).

43. W. Keeton, Prosser and Keeton on Torts 1061 (1984).

44. The reporting statutes provide statutory immunity from civil and criminal liability to persons who report suspected child abuse. To be entitled to immunity, the reporter must have acted in good faith. A number of reporting statutes presume good faith. *See, e.g.*, Florida, Illinois, Main and North Carolina.

tive custody. Immunity is granted only to those persons acting in good faith. In some states, however, good faith is presumed; anyone suing a reporter therefore has the burden of proving that the reporter acted in bad faith. Because fear of legal action is frequently a reason for not reporting, any education program must clearly explain the immunity provision to all potential reporters.⁴⁵

School officials and teachers who find themselves named as defendants in litigation growing out of the reporting statutes can take comfort that as long as they acted reasonably and in good faith, the law will probably shield them from liability.

The Critical Role of Educators in the Preservation of Evidence of Child Abuse

Physical, psychological, and sexual abuse of children is usually committed in the privacy of the home, and perpetrators go to great lengths to keep their activities secret. Children are threatened with dire consequences if the truth comes out, and many youngsters are consequently intimidated into silence.⁴⁶ Teachers, school nurses, counselors, and educational psychologists are frequently in a good position to detect abuse that a child is afraid to disclose. Moreover, the special relationship that often exists between student and educator may enable a child to confide the secret to a trusted teacher when the child would not tell anyone else.

Educators sometimes become aware that a child is abused through observation of the child's body, clothing, or demeanor.⁴⁷ As a police officer or lawyer would put it, the educator learns of abuse through *physical evidence*. Alternatively, abuse may be revealed by statements made by the child — *verbal evidence* of wrongdoing. For the reasons developed below, it is vitally important that educators be taught rudimentary steps they can take to preserve physical evidence and increase the probability that a child's verbal statements will be admissible in legal proceedings.

Hearsay Evidence

Abuse frequently comes to light when children respond to questioning from adults who suspect that something is wrong. On other occasions, victims spontaneously reveal what happened. When such statements are offered as substantive evidence of child abuse, they are hearsay, and

45. Note, *State Child Abuse Statutes*, *supra* note 13, at 262-63.

46. Child abuse — especially sexual abuse — is seriously underreported. One study of sexual abuse revealed that only two percent of intrafamily and six percent of extrafamily sexual abuse was reported to authorities. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 *Child Abuse and Neglect* 133, 137 (1983).

47. *The Battered Child* (C. Kempe & R. Helfer eds. 3d ed.1980) (how to recognize abused and neglected children).

under the hearsay rule they must be excluded unless they fall within an exception to the rule.⁴⁸ Child abuse is often very difficult to prove,⁴⁹ and a child victim's hearsay statements frequently constitute the most important evidence of wrongdoing.⁵⁰

This subsection contains a brief overview of the hearsay exceptions most frequently utilized in child abuse litigation. Following this discussion, we cull from the case law a list of factors which educators should watch for and document in order to increase the likelihood that a court will find a child's statements to be within an exception.

Courts utilize several exceptions to the hearsay rule to approve admission of statements by children. The most frequently employed is the so-called excited utterance exception, which permits admission of statements "describing or explaining an event or condition made while the declarant was under the stress of excitement caused by the event."⁵¹ The reporters contain many child abuse decisions relying on this exception,⁵² and the case of *State v. Boodry*⁵³ is a good example of proper application of the exception. In *Boodry*, the Arizona Supreme Court approved the admission of statements by a 5-year-old victim of sexual abuse. When a neighbor heard the child "crying and hollering 'Daddy, oh, Daddy,' as if she were being whipped,"⁵⁴ the neighbor broke into the house where she discovered the child's father in the act of sexually molesting the girl. The neighbor grabbed her and "ran out of the house carrying the child. She testified that the child was crying and very frightened and the child immediately began telling her what happened. The victim said that her father had had intercourse with her and repeated the words he had used during the occurrence."⁵⁵ It would be difficult to imagine a more appropriate case for application of the excited utterance exception. The child was injured, in pain, and afraid, the startling event occurred moments before her declarations, her statements were directly related to the abuse, and finally, the child spoke spontaneously rather than in response to questioning.

In *Boodry* the excited statements were uttered immediately following the startling event. It is not necessary, however, that a child's statements be made straightway. Courts use the excited utterance exception

48. The Federal Rules of Evidence define hearsay as follows: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

49. See generally, Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. Family L. (1986) [hereinafter cited as Myers], and authorities cited therein.

50. For an excellent article on the issues raised by use of hearsay evidence in child abuse litigation, see Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Columbia L. Rev. 1745 (1983) [hereinafter cited as Note, *Comprehensive Approach*].

51. Fed. R. Evid. 803(2).

52. See cases collected in Note, *Comprehensive Approach*, *supra* note 50.

53. 394 P.2d 196 (Ariz. 1963), cert. denied, 379 U.S. 949 (1964).

54. *Id.* at 197.

55. *Id.* at 197-98.

to admit declarations made minutes and even hours after the event.⁵⁶ Furthermore, some courts hold that statements are within the exception if spoken at the first safe opportunity, such as when a child is reunited with his or her mother.⁵⁷ The most important factor is that the child remain upset or disturbed by the abuse.

In addition to the excited utterance exception, courts occasionally rely on other exceptions to the hearsay rule, including the exceptions for present sense impressions,⁵⁸ statements to medical personnel for purposes of diagnosis and treatment,⁵⁹ and, where it applies, the so-called residual exception.⁶⁰

In 1982 Washington enacted a child victim hearsay exception which authorizes admission of statements which do not fit within other exceptions.⁶¹ In effect, the Washington exception permits admission of all reliable hearsay statements by a child which relate to abuse — a broad brush approach necessitated by the difficulty encountered in proving child abuse. At least six other states have followed Washington's lead, and others may be expected to join the growing trend in favor of admitting child victim hearsay.⁶²

A careful reading of the child hearsay cases leaves the clear impression that courts evaluate the totality of the circumstances to determine whether a child's out of court statements bear sufficient indicia of reliability to merit admission under an exception to the hearsay rule. The following factors emerge again and again as the most important:

1. Length of time elapsed between the abuse and the child's statements,⁶³
2. Whether the statement was made in response to questioning from an adult, and if so, whether the questioning was leading or non-directive.⁶⁴

56. See, e.g., *Haggins v. Warden*, 715 F.2d 1050 (6th Cir. 1983), cert. denied, 104 S. Ct. 980 (1984) (delay of one to one and a half hours between event and declaration did not defeat spontaneity); *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) (two hour delay did not destroy spontaneity).

57. See, e.g., *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979).

58. See *State v. Hieb*, 693 P.2d 145 (Wash. Ct. App. 1984). There are very few reported decisions in which child victim hearsay is admitted under this exception to the hearsay rule. For discussion see *Myers*, supra note 49.

59. See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 83-85 (8th Cir. 1980); *Goldade v. State*, 674 P.2d 721 (Wyo. 1983), cert. denied, 104 S. Ct. 3539 (1984). See also authorities collected in *Myers*, supra note 49.

60. See, e.g., *United States v. Nick*, 604 F.2d 1199, 1203-04 (9th Cir. 1979); *M.N.D. v. B.M.D.*, 356 N.W.2d 813, 818-19 (Minn. Ct. App. 1984); *State v. McCafferty*, 356 N.W.2d 159 (S.D. 1984); *Myers*, supra note 49.

61. Wash. Rev. Code Ann. § 9A.44.120 (Supp. 1984). See Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legal Innovations*, 98 Harv. L. Rev. 806 (1985); *Myers*, supra note 49.

62. The states are Colorado, Indiana, Kansas, Minnesota, South Dakota, and Utah.

63. See, e.g., *Haggins v. Warden*, 715 F.2d 1050, 1057 (6th Cir.), cert. denied, 104 S. Ct. 980 (1984); *United States v. Iron Shell*, 633 F.2d 77, 85 (8th Cir. 1980); *State v. Rivera*, 678 P.2d 1373, 1375 (Ariz. 1984).

64. See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 85 (8th Cir. 1980); *W.C.L. v. People*, 685 P.2d 176, 180 (Colo. 1984).

3. Whether the statement is accompanied by signs of excitement or distress,⁶⁵
4. The physical and emotional condition of the child,⁶⁶
5. The child's age,⁶⁷
6. Whether the statement was a product of reflective thought or spontaneous reaction,⁶⁸
7. The characteristics of the event and the subject matter of the statements,⁶⁹
8. Whether the statement was made at the first safe opportunity,⁷⁰ and
9. The child's incentive to lie.⁷¹

When a child spontaneously reveals abuse, or when educators question a child to follow up their suspicions about his or her well-being, they should do so with the foregoing factors clearly in mind. Contemporaneous written notes should be taken and carefully maintained. The notes should document *exactly* what is said, when, where, to whom, and under what circumstances.⁷² If the child is excited or upset, this should be carefully noted. It is good practice to have two responsible adults present when questioning occurs.

When questioning is necessary, it is very important that it be non-directive rather than leading. Courts hold that the spontaneity needed for admission under the excited utterance and other exceptions is not destroyed by questioning as long as the questions do not suggest the answers.⁷³ For example, it would be acceptable for the educator to ask questions like: "What happened?" "Tell me about it." "Is there more?"

65. See, e.g., *W.C.L. v. People*, 685 P.2d 176, 180 (Colo. 1984).

66. See, e.g., *Haggins v. Warden*, 715 F.2d 1050, 1058 (6th Cir.), cert. denied, 104 S. Ct. 980 (1984); *State v. Rivera*, 678 P.2d 1373, 1375 (Ariz. 1984).

67. See, e.g., *Haggins v. Warden*, 715 F.2d 1050, 1058 (6th Cir.), cert. denied, 104 S. Ct. 980 (1984).

68. *Id.*

69. See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980).

70. See, e.g., *State v. Messamore*, 639 P.2d 413, 418 (Hawaii 1982).

71. Children are unquestionably able to lie. The child's developmental age will influence his or her ability to stretch the truth. Numerous authorities believe that young children do not usually lie about abuse, especially sexual abuse. For discussion regarding whether children tell the truth about their abuse see Myers, *supra* note 49.

72. An interesting and difficult question arises regarding whether notes of a child's statements become part of the child's education record under the Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g; 34 C.F.R. § 99 (Buckley Amendment). If the notes are a part of the child's record, parents may have a right to inspect the notes. 34 C.F.R. § 99.11. If the notes become part of the record, the question arises as to whether school officials can disclose the notes to prosecutorial, law enforcement, or child protective services officials. Section 99.35 of the Buckley Amendment regulations set forth several circumstances under which education records can be disclosed without parental consent. It does not appear that an exception exists for giving the contemplated notes to proper authorities, unless those authorities (1) secure a court order or a subpoena (34 C.F.R. § 99.31 (a)(9)), or (2) unless it can be argued that the exception for disclosure of records because of a "health or safety emergency" applies. *Id.* § 99.31 (a)(10).

73. See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); *Alston v. United States*, 462 A.2d 1122 (D.C. 1983).

Leading questioning like the following could defeat admissibility: "Did your daddy hit you with a belt or with a stick?" "Your mommy made you cry didn't she?" "Did your brother put his pepe in your mouth?" The importance of non-leading questioning cannot be overemphasized. A statement which fits within a hearsay exception and which may be the only solid evidence of abuse will be excluded if elicited through improper questioning.

Educators are in daily contact with children, some of whom are abused. When a child describes his or her abuse, the educator is in an excellent position to take steps to increase the likelihood that legal action can be taken to protect the child. At the same time, however, the manner in which an educator responds to a child's cry for help can quickly undermine or destroy the state's ability to intervene. With this stark reality in mind, administrators and their counsel are well advised to provide the in-service training needed to equip teachers and ancillary personnel with the knowledge required to respond appropriately.

Physical Evidence

Educators may become aware of abuse through their observation of the child. The signs may be as obvious as bruises in unusual locations, cuts, or a limp, or as subtle as discomfort when sitting, inappropriate clothing designed to hide the evidence of abuse, or slowly progressive malnutrition. Whatever the signs that raise the educator's suspicion, careful and detailed written notes should be made as soon as possible. Since the physical evidence of abuse or neglect may well be gone before litigation is commenced, let alone completed, the educator's documentary notes may be the best evidence of the child's condition when abuse was detected.

Preservation of physical evidence through laboratory testing, physical examination, x-rays, and photographs is the work of police officers, physicians, and child protection workers. Most child abuse reporting statutes make specific provision for such matters. In order to facilitate the gathering and preservation of such valuable evidence, educators should respond to suspected abuse promptly so that appropriate officials can step in and take necessary action.

Conclusion

The phenomenon of child abuse and neglect cannot be ignored. The physical and mental well-being of too many children is at stake to permit ourselves to become complacent. Educators and their attorneys are in a position to take affirmative steps to ensure that children who are the unfortunate victims of violence or neglect are protected. The time is at hand to take those steps.

Special Education: Related Services Under 94-142

Julie Underwood O'Hara

Introduction

One of the more controversial and possibly most expensive aspects of the Education for All Handicapped Children Act (EHCA) is its related services mandate. Related services as defined by the Act are "such developmental, corrective, and other supportive services...as may be required to assist a handicapped child to benefit from special education."¹ Specifically these may include "transportation...speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training."²

Since the EHCA excludes only medical services from the related services mandate, virtually any service that would allow a handicapped student to benefit from the special education program could be considered a related service. Much of the litigation to date has been concerned with defining the precise parameters of the related services listed within the Act and with whether or not certain other services should be considered related services.

This piece will focus on three parts of the related services issue: (1) a student's eligibility for services; (2) the extent of services required; and (3) the different types of services required.

Eligibility

The Supreme Court in *Irving Independent School District v. Tatro*,³ emphasized that the child must be "handicapped" under the Act (so as to require special education) before he or she can be eligible for related services. "In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act."⁴ Thus a student who may need some

1. 20 U.S.C. 1401 (17).

2. 34 C.F.R. 300.13 (1983).

3. 104 S. Ct. 3371 (1984).

4. *Id.* at 3379.

counseling services but does not require other special educational services is not handicapped and does not qualify for related services. This is consistent with a comment to the federal regulations which states:

The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 300.5). The definition of "related services" (section 300.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not handicapped) is not covered under the Act.⁵

This can be seen in a 1984 Illinois State Education Agency decision to uphold a district's decision to not provide services to a six-year-old boy who had been comatose since 1980. The agency determined that the boy was not in need of educational services because he remained totally unresponsive. Since he was not in need of special education the district was not responsible for his physical and occupational therapy needs.⁶

A different outcome was reached in *In re Lori B.*,⁷ a 1983 Alaska State Education Agency decision. There the school district was contending that it should not be held responsible for a cerebral palsied child's occupational and physical therapy because she was not mentally impaired and was on an educational level with her peers. "The district, in formulating their position, has defined schooling in such a way as to limit the capacities at risk to intellect, cognition, and speech. These limits are too narrow for a normal child, much less one with a disability." The State Education Agency determined that the child was "handicapped" under the Act, as in need of special education because her impairment was severe enough to restrict significantly her ability to participate in regular schooling.

Extent

The Supreme Court's first decision interpreting the EHCA, *Board of Education v. Rowley*⁸ did not specifically address the issue of "related services." It did review a district's responsibility and concluded that the Act was designed to maintain a "basic floor of opportunity" of education for the handicapped. This floor consists of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."⁹ Thus, *Rowley* implies that whatever else a "related service" is, it does not come into existence unless its presence is essential to achieve a "basic floor of opportunity."

5. 34 C.F.R. 300.14 comment (1) (1983).

6. 506 E.H.L.R. 239 (S.E.A. Ill. 1984).

7. 506 E.H.L.R. 103 (Alaska State Educ. Dec. 1983).

8. 458 U.S. 176 (1982).

9. *Id.* at 201.

In *Tatro* the Supreme Court again emphasized this idea that only those services which are necessary to allow the child to benefit from the special education are required related services under the Act. "[O]nly those services necessary to aid a handicapped child to benefit from special education must be provided."¹⁰ There it was determined that clean intermittent catheterization (CIC) was necessary for Amber Tatro, a child with spina bifida, to receive CIC during school hours in order to benefit from her special education.

It is clear on this record that, without having CIC services available during the school day, Amber cannot attend school and thereby "benefit from special education." CIC services therefore fall squarely within the definition of a "supportive service."¹¹

Types

Transportation

The definitions of "related services" in the statute and the regulations specifically include "transportation" as a related service. The Supreme Court in *Tatro* specifically noted that transportation was a related service which does "no more than enable a child to be physically present in class." The Court stated that the "services enable the child to reach, enter, or exit the school" are "related to the effort to educate."¹²

Transportation is probably the most common service provided by local education agencies to handicapped students. There are two situations in which a local education agency must provide transportation. First, if the district provides transportation for its general school population, it is responsible for providing handicapped students with transportation to any special education program in which it places them. Second, if it does not provide transportation to the general school population, it must decide on an individual basis whether a student needs transportation to benefit from special education.¹³ As with all other related services transportation is to be provided free of charge. However, transportation fees normally charged to nonhandicapped students appear to be within ordinary meaning of "incidental fees" under Regulation 300.14(b)(1) and can be charged, unless the child is the only child in the family and requires specially designed transportation as a related service.¹⁴

Transportation may include door to door service, carrying the child from the door of the residence onto the vehicle if necessary.¹⁵ However, the school district is not responsible for transporting the child past the

10. 104 S. Ct. at 3379.

11. *Id.* at 3377.

12. 104 S. Ct. at 3377.

13. *Dubois*, as reported in 211 E.H.L.R. 267 (1981).

14. *Stormer*, as reported in 211 E.H.L.R. 108 (1981).

15. *Hurry v. Jones*, 560 F. Supp. 500 (D.R.I. 1983), *aff'd*, in part, *rev'd*, in part (No. 83-1604, No. 83-1718 (1984)).

residence threshold. Thus a district was not required to assist a wheelchair bound student in getting up and down stairs inside his apartment building.¹⁶

Services may be required to transport a handicapped student to and from other services, e.g., to speech therapy sessions held at a public school,¹⁷ or to and from therapy sessions at a hospital.¹⁸ In addition, transportation may be required to and from residential placements, but only when necessary for the student to benefit from the education.¹⁹ In *Cohen v. School Board of Dade County, Florida*,²⁰ the court determined that the district was only responsible for transportation to and from a residential placement for the student three times a year; other trips by the student and his parents were deemed to be for therapeutic purposes, rather than necessary for him to receive education in the residential placement and thus were not the district's financial responsibility.

Medical and Health Services

The regulations provide for the provision of medical services for diagnostic and evaluation purposes only. The Supreme Court in *Tatro* defined medical services as services not necessarily prescribed and eventually supervised by a physician, but those required to be provided by a physician. Thus, there the district was required to provide catheterization for a spina bifida child. Another example of this is in *Clermont Northeastern Schools* in which the Office of Civil Rights determined that because vision therapy needed by a student required the services of an optometrist rather than a vision therapist, it was a medical service and thus out of the parameters of required related services.²¹ Whereas occupational and physical therapy are not transformed into a medical service merely because they have been prescribed by a physician.²²

The regulations provide for the provision of other health services. They define "related services" for handicapped children to include "school health services,"²³ which are defined in turn as "services provided by a qualified school nurse or other qualified person."²⁴ Like medical services, these too are defined in terms of the provider's qualifications.

In summary, whether the district has to provide a particular service to a particular child as a related service does not depend upon how specialized the service may be or even whether it is essential to sustain the child's life, but upon whether it is a service which the required

16. *Jones*, as reported in 254 E.H.L.R. 21 (OCR 1984).

17. *Cited to* 507 E.H.L.R. 125 (S.E.A. Cal. 1985).

18. Case No. 250, 502 E.H.L.R. 323 (S.E.A. Cal. 1981).

19. Case No. 6120, 502 E.H.L.R. 234 (S.E.A. Mass. 1982).

20. 450 So. 2d. 1238 (Fla. Dist Ct. App. 1984).

21. *Clermont Northeastern Schools*, as reported in 257 E.H.L.R. 577 (OCR 1984).

22. Case No. 84-0848, 506 E.H.L.R. 340 (S.E.A. Mass. 1984).

23. 34 C.F.R. 300.13(a) (1983).

24. 34 C.F.R. 300.13(b) (1983); *Tatro*, 104 S. Ct. at 3377-8.

service personnel described in the statute and its regulations can reasonably be expected to provide. If it is such a service it must be provided so as to facilitate the handicapped child's participation in the educational process in a manner consistent with the other requirements of the Education for All Handicapped Children Act.²⁵

For example, a district in Hawaii was required to provide an aide to monitor a respirator and provide suctioning of mucus from a student's respiratory tract.²⁶ A district in Illinois was not required to employ a R.N. as an aide for a physically and mentally handicapped boy.²⁷ A district in New York was not required to provide an L.P.N. specially trained in respiratory therapy to accompany a student to school and to suction her lungs and throat, feed and give her medication through a jejunal tube, and monitor and record her input and output.²⁸

Counseling and Psychological Services

As with any related service one must first determine if the counseling or psychological services are for educational purposes.²⁹ If they are determined to be necessary for the child to benefit from special education, psychotherapy and counseling services are related services required by the Act to be provided by the local education agency.³⁰

A recent problem in this area is the question of whether psychotherapy, when provided by a licensed psychiatrist, remains a required counseling service, or if it then becomes an exempt medical service. The current trend seems to follow the opinion in *Max M. v. Thompson*.³¹ There the court determined that the professional degree and qualifications of the care provider did not in itself transform the nature of the services provided. Psychotherapy then was not considered a medical service. Further, the court found that the district could be financially liable for "no more than the cost of the service as provided by the minimum level health care personnel recognized as competent to perform the related service."³²

25. Case No. SE-27-84, 506 E.H.L.R. 103 (S.E.A. Ill. 1984).

26. State Dept. of Educ. of Hawaii v. Katherine, 727 F.2d 809 (9th Cir. 1984).

27. Case No. SE-27-84, 506 E.H.L.R. 103 (S.E.A. Ill. 1984).

28. Case No. 11403, 506 E.H.L.R. 378 (S.E.A. N.Y. 1984).

29. *McKenzie v. Jefferson*, 566 F. Supp. 404 (D.D.C. 1983); *Darlene L. v. Illinois Bd. of Educ.*, 568 F. Supp. 1340 (N.D. Ill. 1983); Case No. 84-1334, 506 E.H.L.R. 225 (S.E.A. N.J. 1984); 507 E.H.L.R. 121 (S.E.A. Cal. 1985).

30. *Board of Educ. of Piscataway N.J. v. Prudential Ins. Co. of Am.*, 576 F. Supp. 420 (D.N.J. 1983); *Papacoda v. Connecticut*, 528 F. Supp. 68 (D. Conn. 1981); *Gary B. v. Cronin*, 542 F. Supp. 102 (N.D. Ill. 1980); *In re A Family*, 602 P.2d 157 (1979).

31. 592 F. Supp. 1437 (N.D. Ill. 1984).

32. *Id.* at 144.

Recreation

Recreational activities are a possible related service where they are necessary for the student to benefit from special education. In a Wisconsin ruling, the state education agency determined that a scouting program could be a required related service, but in the situation at hand it was not since the child's "socialization needs could be and were being met by the district. Therefore, the district [was] not... required to provide scouting as a related service."³³ In *Kathleen G. and David G.*, a Massachusetts ruling,³⁴ the students were seeking transportation to and from extended day sports programs at school for the deaf which they attended. The state education agency found that one of the student's educational needs included an extended day program for extra-curricular activities. The student for whom this was required had a profound hearing loss and related emotional problems. The state education agency determined that she had

special education needs addressing her social-emotional development, that informal social situation combined with counseling is the vehicle for addressing such needs, that such informal social situation is not provided during the day's structured academic setting and is not available in her community.³⁵

Auxiliary Aids and Equipment

In *In re Mary*³⁶ the district was required to make available to the student on a twenty-four hour basis an Apple IIe package, communication and academic software, adaptive firmware card, votrax speech synthesizer and silent reviewer. It was determined that with the equipment Mary would be able to make gains in communication she was previously unable to achieve. However, in *Tatro* the Supreme Court made specific mention of the fact that the district was not required to provide the equipment necessary to catheterize the student.³⁷ The difference may be the individualized nature of the equipment. A district is not required to provide individually prescribed equipment for a student's personal use whether or not it is necessary for the student's education. The most obvious example of this is the district's absence of responsibility to provide eyeglasses for students.³⁸

33. Case No. 55, 506 E.H.L.R. 387, 395 (S.E.A. Wis. 1984).

34. Cases No. 84-0347, No. 84-0345, 506 E.H.L.R. 317 (S.E.A. Mass. 1984).

35. *Id.* at 319.

36. Case No. 84-0720, 506 E.H.L.R. 325 (S.E.A. Mass. 1984).

37. *Tatro*, 104 S. Ct. at 3379.

38. Bureau of Education for the Handicapped (B.E.H.) Policy Letter.

An Update on the Ever Growing Momentum of Teacher Competency Testing

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This paper is an abbreviated and updated version of a paper presented at the Annual Meeting of the American Educational Research Association, 1985.

Teacher competency testing for the purpose of screening persons prior to state certification continues to be on the upswing in the United States. The testing is usually of the paper-pencil type although teacher performance assessment testing (observing and assessing teachers' performance on-the-job) has been gaining zeal. Sandefur (1985) reports thirteen states that are presently implementing, developing, or planning on-the-job assessment as part of their certification process.

This paper provides an update on the more prevalent paper-pencil type of competency testing activity, as well as a discussion of some of the issues that should be considered by states pondering the development and implementation of these teacher certification or competency testing programs. While certification testing appears to offer a solution to certain problems and issues related to quality control, selection, and public relations, it also raises a series of new problems and issues.

This paper will not attempt to consider the issues and problems surrounding the testing of practicing teachers since this would open up many other issues that must be considered. Also, since the teachers' organizations and unions are against this level of testing (McCarthy, 1985), there is currently not as much activity at this level as at the entry level. However, some states have already implemented or decided to implement recertification testing (Arkansas, Georgia, Texas), while some states do or will consider use of these tests for assignment of salary levels/career ladders (Florida, Georgia, Oklahoma, Tennessee), and others have been exploring ideas along these lines. The tendency to expand the "turfdoms" of teacher competency testing is strong (e.g., the Georgia legislature has recently passed an education-reform act which includes career ladder testing and extensive recertification testing, Olson, 1985). We will surely be hearing more about this level of teacher testing in the future, especially from a legalistic perspective.

Competency Testing Activity Updated

Delineating which states are involved with the entry and certification level types of teacher competency testing, where they are in their involvement, and what tests they are using or planning to use is not an easy or exact task. Since the movement is growing and is often a *very* political endeavor, situations can and do change rapidly. Even though a state has not announced or mandated plans for a program, there may be those in the state who are contemplating such a program. As pointed out in a 1984 article (Flippo & Foster), between the time that article was written and its publication (only about 6 months later), the situation had already changed. Certainly, since discussing the states' activities for another paper (Schnittjer & Flippo, 1984), the activities had increased for many states and the number of states involved at different levels had also grown. Additionally, since presenting a more in-depth version of this paper in April 1985 (Flippo) more commitments toward teacher competency testing activity have been made by the states.

Most of the paper-pencil teacher testing is being done by Educational Testing Service (ETS) or National Evaluation Systems (NES), although some states are using other tests (Colorado requires the California Achievement Test (CAT); Oregon uses the California Basic Skills Test). Basically, there are two choices regarding the selection of tests that could be used for competency/certification testing: existing tests, or customized tests. The ETS tests are usually existing standardized tests and the NES tests are usually "customized" tests. The tests from ETS can be validated for use in a state (McCarthy, 1985; NTE Policy Council, 1983) and meet the Uniform Guidelines content (1978). The customized tests from NES can be developed to meet a state's certification areas, and also can be validated to meet Uniform Guidelines (McCarthy, 1985; Rubinstein, McDonough, & Allan, 1982).

Where are the states *now* in their involvement, or who is doing what? Many states do have some sort of testing program in place and are fully implementing those programs (Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, and Virginia). In other states, testing programs are still at some stage of development (i.e., all planned testing is not as yet implemented) and plans are that they will be fully implemented between 1985 and 1987 (Connecticut, Hawaii, Indiana, Nevada, New Hampshire, New York, Texas, and West Virginia). Several other states have decided to test competency, but have not made commitments yet regarding which tests they will use. Plans indicate that programs will be implemented by the close of 1988 (Illinois, Kansas, Maine, Missouri, Minnesota, Nebraska, New Jersey, Pennsylvania, and Washington). In some states with already existing competency testing programs, planning or discussion is underway to expand testing to other levels. For example, Geor-

gia and Oklahoma are planning for career ladder testing of their already practicing teachers.¹

Finally, in other states, the issue of teacher competency or certification testing is still being explored. Sandefur (1985) reported these states as Illinois, Maryland, Montana, North Dakota, Ohio, South Dakota, and Wisconsin. Since that report, Illinois has already enacted legislation, and Minnesota, not previously cited as a state considering the testing, also enacted legislation to test the competencies of new teachers. As pointed out in my April 1985 paper, there are many questions, issues, and problems that should be asked or addressed *before* a state takes the teacher certification testing plunge.

Issues and Problems Raised

Quality

Can quality really be improved by certification testing? Some states (Florida, Georgia, Louisiana, Oklahoma) claim that it can ("State Activity," 1980; Scherer, 1983); however, their evidence usually consists of rising test score data. Educational researchers have questioned the validity of the data and improvement of teacher quality claims (Kauchak, 1984; McPhee & Kerr, 1985; Sykes, 1983; Weaver, 1984). When the data and the circumstances surrounding the issues are better understood, it becomes evident that rising test scores indicate no more than that more persons are able to *pass* the tests.

When using certification tests to mandate the quality of teacher education programs and the products of those programs, certain issues and problem areas should now be carefully considered.

A wedge develops between colleges/universities and the state department of education. The use of the test is usually perceived as a measure of the quality of the universities, faculties, and their teacher education programs. Even though a state department of education may deny it, the idea is undeniable, if a state chooses to test the products of the teacher education programs. The universities feel strongly that their graduates are competent. To test them puts the universities on the defensive (Jacobson, 1985). Rather than act on a collegial relationship with the department of education, adverse or even hostile relationships often develop.

Results from these tests are often compared. Data indicate the pass/fail rates at each institution. Some institutions do far better than others. These comparisons are never fair, given the different populations of students that often attend the different institutions within the state.

1. Information for this update of states' activities regarding competency testing was extrapolated from the following sources: Allan (1985), Bosworth (1985a), Bosworth (1985b), Flippo (1985), Flippo and Foster (1984), Sandefur (1985), and Schnittjer and Flippo (1984), as well as from the additional research of this author.

The testing also often causes a rift between the different faculties/programs at the universities and the education faculties/programs. Many who finish a teacher certification program take their major coursework from other programs. For instance, the pre-service history teacher takes most of his/her coursework from the social sciences or history department. If that person is not later successful passing the certification test, the teacher education program often is given the responsibility. This rift between university programs is not a healthy one. It goes further in causing negative feelings between the universities and the state department of education.

Teaching toward passing the test. When it eventually becomes obvious to the universities' faculties that their programs are being compared and/or that their students' abilities to pass the test are reflecting on their programs' images or even survival, the trend to teach toward the test rears its ugly head. Minimum competencies can become the curriculum. Most school systems instituted the widespread minimum competency testing of children between 1975 and 1980 and have had to grapple with this issue. Even so, evidence indicated by the recent major studies in education show that our schools and children are still not up to par. As a matter of fact, they may be suffering from the mediocrity that competency testing tends to promote. Research has indicated that this widespread testing can often retard rather than advance the interests of students, since bureaucratically sanctioned testing tends to place more focus on the tests than on the substance of what the tests are intended to measure (Haney, 1984).

In some colleges/universities in some of the states implementing certification testing, pop courses or program courses have developed on "how to pass the test." Since the objectives or content of the tests are available (and often even promoted), these courses focus on those objectives. When students taking the course have already experienced the test, remembered test questions are recorded and studied. Many testing programs use the same questions over and over again, rotating questions only when they have been used to test several hundred examinees. For some tests with a relatively small number of examinees (for teaching fields that do not attract large numbers of persons), test questions can remain the same for *years* of administrations. Naturally, test scores go up.

Excellent programs are not necessarily reflected by test results. Universities that abhor the concept of mediocrity are not necessarily rewarded by students automatically passing the test. Sometimes those who know more, read more into the questions. Their knowledge of the most recent research and literature can cause many choices in addition to the "correct one" to be plausible. Again, mediocrity (or not knowing as much) can become rewarded, and excellence can be punished. Some of these excellent programs can be put on probation or even abolished for consistent evidence that their students do not do as well on the test as those programs that might be teaching the test.

Problems caused by programs with low pass rates. What about the colleges/universities who consistently have low passing rates? What is to be done? Should the programs be put on probation or closed down? Should *more pressure* be put on the programs to get students to pass the tests? Should the results be ignored because the issue is too embarrassing, awkward, or sensitive to handle? For instance, what if the programs are in colleges/universities with large minority populations? These are issues that should be dealt with and agreed upon *before* a testing program is planned. If the state spends large amounts of money to institute a testing program, what is to be done with the results of those tests? If they are ignored, why bother to give them? If they are not ignored, how will the state deal with these sensitive problems?

Test scores eventually tend to rise because the questions, objectives, or content are known. This screens out fewer and fewer persons. Since the purpose of the testing should be to screen out persons who are not competent enough to teach in the schools, tests with known questions or content become less and less effective at screening the more they are administered. How does the state deal with that? Are the tests continued anyway and are persons virtually "rubber stamped" into the profession? Are the cut-scores raised? How will rising scores be handled? Perhaps the rise in scores will be handled as a public relations move to indicate that the teaching has caused an improvement in teacher education in the state?

What about those who still do not pass? After repeatedly taking the test, some persons still cannot pass it. In most states the tests can be taken over and over again, but there are always some who never seem to be able to pass the test (i.e., really only a relatively small number of persons do not *eventually* pass the tests when programs have been in existence for several years and examinees persevere by repeatedly taking the tests). Are they in a minority/protected group? Are they a VIP to someone with influence at the state level (i.e., the granddaughter of a member of the legislature, the son of a school board member, the daughter of the superintendent's next door neighbor, the assistant principal who is being groomed for principal and *needs* to pass the test first)—more problems for the state department of education. In some instances, situations can conceivably get so embarrassing that some examinees may be given "special attention," like extensive tutoring, until they finally "just pass" the test.

In some states, study guides are developed to get some of the pressure off the state and/or off the universities. These study guides often give examinees tips on how to take the tests, how to study for them, and include sample test questions and references to use in order to prepare for the objective or content being tested. The study guides can be costly to develop. While they are initially a positive attempt, they can also result in problems. If they are good, test scores might rise further without improving quality. If the guides do not help persons having

severe problems, they could be discredited as poor or inadequate study guides.

Has quality been improved or diminished? Just passing the test does not indicate quality. In fact, it might negate quality. There is often no way to compare or identify the individuals who "just pass the tests" with the individuals who "topped out on the tests." Both groups show up as pass data. The bottom line is: Is quality *really* improved? Are programs *really* better? What has *really* been accomplished?

Selection

Can hiring practices really be improved by requiring certification tests? Will more qualified teachers be selected for open teaching positions? How will selection of teachers be affected? Will the certification policies and practices of the state be enhanced? And, finally, will the state attract more able and qualified teachers for its open positions? None of these questions can be answered empirically. The issues and resulting problems however should be carefully considered to provide a more accurate guess at the answers.

Shortages in certain teaching fields. There are already shortages in some teaching fields. Will additional shortages develop in fields where people are not passing tests? Or, will the available applicants in a field be diminished further by some applicants either not passing the test or choosing not to take the tests? If this happens, will others not as prepared for those fields be given temporary certificates or permission to teach in those shortage fields? Or will those in surplus teaching fields be asked to teach in shortage fields until prepared persons are recruited and pass the tests to become certified? In some states this does happen. (See Feistritzer, 1984 for details on the tremendous number of persons on emergency or probational certificates in the states.)

Certification complications. Will the tests add to and/or complicate the already time-consuming certification hassles that prevail in many states on *both* sides: the clerical problems for the state departments of education, and confusion and delay problems for the applicants? (Feistritzer indicates that "The certification of classroom teachers in the U.S. is a mess," p. 36) Will it sometimes appear that the right hand does not know what the left hand is doing? In some states already implementing competency/certification programs, the teacher testing program is a separate unit from the teacher certification program.

What about experienced teachers and other qualified applicants coming from out-of-state? Would this testing requirement discourage them? Would they see it as "one more hoop to jump" and decide it may not be worth it?

Finally, what about reciprocity? What if someone took a state required test somewhere and wanted the new state to accept it in lieu of its

own test? Most of the states involved with these certification testing programs are adverse to reciprocity concerning the tests. In fact, the Southern Regional Education Board (SREB) has been trying for some time to promote reciprocity on testing and has so far failed (Cornett, 1982). States adopting or developing the testing programs tend to make a case for the uniqueness of the teaching objectives and curriculum in their state from those in other states. This perceived uniqueness is one of their major justifications for requiring that everyone take and pass the tests before being certified.

Hiring practices by the LEAs. With use of the tests, will more competent and excellent teachers be hired? Since often only pass/fail results are given to the LEAs, principals, and others making employment decisions, it is possible that decisions will be made with less information available on applicants than if GPAs, student teaching grades/evaluations, recommendations, and experience were the criteria for selection. Of course, an LEA can decide or be allowed to use all the criteria. If so, given the limited information from the pass/fail score, that test information would be relatively useless. But if LEAs were pressured or required to use only the results of the state test, then certification tests might actually have a negative effect on selection of the most qualified individual. For instance, some persons advocating mass state testing programs argue that since grades and the criteria for them vary so much from institution to institution, the test results are an equalizer. If it is not possible for those doing the hiring to distinguish between someone "who has just passed," perhaps after five or six tries, and someone who passed and did very well on his first try, less competent teachers may be hired.

Minority/protected groups. Who is being screened from the teaching profession? Will more minorities/protected groups be screened from teaching because of lower pass rates on the tests? In states where the testing programs are already implemented, the results indicate that more minorities/protected groups are being screened out than the majorities (Kauchak, 1984; McCaffery, 1984; Smith, 1984, 1985). How will the state deal with that data once it is collected? Legal issues here are *not* the problem. The major test developers, ETS and NES, are very attuned to the legal issues. As pointed out earlier, they have tried to develop and/or validate their tests to hold up in court. However, two recent complaints in Texas and Alabama were filed because of the adverse effects on minorities. In Texas, the injunction has led to the test results not presently being used. The complaint is that the state is not doing anything to "remediate" the weaknesses of candidates they are screening out. In Alabama, NES settled out of court to the litigation resulting from the adverse impact on blacks and black colleges.

The problem is that the data does show that the minorities do not fare as well on the certification tests as the white population. This is a major issue and a state implementing a program will have to deal with it even though it does hold up in court.

Public Image

Questions, issues, and problems regarding public image and politics vary considerably from state to state. However, when image and politics are the decisive pressures for instigating a teacher competency testing program, a state should look at the possible long-run issues and new public image problems that can arise from implementing such a program.

National image problems. Teacher certification testing programs do not necessarily create a positive national image for the states implementing them. For instance, prominent educators or other informed citizens might ask, "What was wrong with the teacher education programs, or with education, in that state in order to cause that state to institute such a large and costly program?" Researchers and authors of papers on the competency testing of teachers movement have already pointed their fingers at the South. They have implied that there has been an education problem in the southern states and that is why the SREB strongly recommended teacher testing ("The Need for Quality," 1981). That is why, they have implied, most of the southern states have jumped on the teacher testing bandwagon and the teacher testing programs mushroomed in the South.

The continued low public image of the South's education systems is still evident in statements that southern leaders sometimes make about themselves. For instance, some southern superintendents were reported as opposing the plan of the Council of Chief State School Officers, a collective of state-level superintendents, to develop a system of national indicators that can be used by the public for state-by-state school comparisons and can be used by states to measure their educational progress, because they said "their states were likely to show up on the low end in terms of achievement." ("Top State Education Officials Support Indicators," 1985).

Local image problems. Once a program is implemented and data is collected, several negative images and feelings can develop within a state: (a) A negative image of some of the colleges/universities can develop when some institutions do better than others on these tests; (b) a negative image of some of the minority groups can develop if some groups do better than others on these tests; (c) a negative feeling can develop from the general public when they learn how much these testing programs cost; (d) a negative feeling, in general, about teachers can develop when the public learns that some of them can't pass the tests. Does that mean that some of the teachers who were certified in the past could not pass these tests? ("My child's teacher could be one of those!"); (e) a negative feeling toward further support of education can develop. Already tight money for education programs for children can get even tighter when the public and the legislature know how much extra they are already spending on the teacher competency testing program.

Recommendations

This paper has painted a rather negative picture of the problems and issues surrounding teacher certification testing programs. It was meant to. Teacher certification testing is not the "final solution" or panacea for pressures regarding quality, selection, and public image. If teacher certification testing is implemented, a whole new set of pressures and problems regarding quality, selection, and public image must be handled. There is a trade-off. What appears to be an expedient solution now may prove to put the states, the universities, and the future teachers in a vicious circle.

My recommendations are fairly simple: (a) explore all these pressures, issues and potential problems extensively; (b) project the implications five or ten or more years from now; and (c) if a decision is made to test, then do it *to the minimum*.

Do it so that it will not create adverse relationships between the state department of education and the universities. Do it so that it will not negatively affect the quality of programs and cause "teaching to the test." Do it so that it is not another burden for taxpayers and so that it does not add fuel to the public image fires concerning teacher quality and expenses for education. Finally, do it so that it does not cause *anyone* to point a finger at *anyone else*.

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Keeping "Education" in Education Law

E. Edmund Reutter, Jr.

Banquet Speech at NOLPE Convention in Chicago

It has always been a prime thrust of NOLPE to assist educators in learning about those aspects of law that are pertinent to education. Also, over the years the organization has been outstanding (and, for a substantial period, unique) in its help to lawyers who wanted to know about the law that affects education. Today, what was then a field explored by few, has become a bustling focus of legal activity, and the numbers of persons, organizations, and publications devoted to it have proliferated. Yet NOLPE remains alone as the organization that brings educators and lawyers, occupying various positions relative to their professions, together for the good of education (and, through it, the good of society). Lawyers within states and nationally have awakened to a field that can be very profitable for them as well as providing psychic rewards. Unfortunately for education, many of the attorney groups putatively dedicated to education law are in grave danger of succumbing to the notion that "legal" ways of thinking and techniques of legal research, procedure, and argumentation are all that is needed. Educators too are culpable in that to some of them education law is simply something to be left to lawyers. To some others, it is simply something with which to contend rather than something to be shaped and directed as a positive force for improvement of education. There is peril that at points in education law the law component, instead of protecting and enhancing the substantive education component, may be strangling it. This is not necessary. It is not good. We should not let it happen.

The Marriage of Law and Education

In order to properly serve the public interest in education in our society it is necessary to forge effective relations between the professions of education and of law. This involves special liaisons among educators who are conversant with law and lawyers who are conversant with education. To say that to this group may seem like preaching to the converted. But perhaps even we can stand a reminder that education is the enterprise to be served within a framework of law, not the converse.

Education law represents the intersection of two bodies of knowledge and practice, both absolutely integral to a flourishing society. It obviously is necessary that institutionalized education function within bounds that are recognized as the law. Although specifics may differ, this is true whether we are looking at public or private education, at

lower or higher education. The legal constraints are articulable as (1) prescriptions (something must be done — cause shown before terminating a contract), (2) proscriptions (something must not be done — employment decisions based on gender), (3) optional powers (something may be done — moderate corporal punishment administered to students). The value judgments (something should or should not be done) essentially are derived not from law but from considerations of educational expertise, public policy, and ethics. The law tells what is mandatory and what is permissive, not what is wise or feasible.

In contrast to most circumstances in education, there are ultimate answers in the law at a given moment on given facts. Each question posed to a court is answered yes or no. The format for obtaining answers is adversarial. Judges base decisions on what is presented to them by the two sides. Independent supplemental investigation or research is not conducted. Thus it becomes essential to have the educational rationale for a challenged action presented clearly and persuasively. It is at this point that the educator must play a key role to be certain that this is done. Insertion of educational points with records, research, and validated experience to support them is critical to achieving proper outcome at the trial. If the educational element seems not strong enough in light of the rights of the other party, then the case simply should not go to trial. The attorney should help the client to face up to such a situation rather than to proceed "on a wing and a prayer." The bringing or defending of weak cases has mushroomed in recent years to the detriment of education and society.

Teacher organizations, special interest advocacy groups, and school boards seem equally guilty of degrading the educational ingredient in school law cases. On occasion they seem willing to spend large sums of money almost whimsically. Consider, for example, some cases carried to the Supreme Court and there decided unanimously.

Not one Supreme Court Justice in 1979 agreed with the teacher association's argument that a teacher on tenure could not be discharged for refusing to take inservice courses — and this when the association concurrently was seeking higher salaries and benefits for teachers because of the qualifications and dedication of those so employed.¹

Another flagrant denigration of the education element can be found in the teacher association argument unanimously rejected in 1976 that where there is collective bargaining, a teacher who is not a union representative cannot speak at a school board meeting open to the public about a topic that is subject to bargaining.² The union contended that such was an unfair labor practice, despite the fact that the president of the union had spoken on the union's position at the open meeting and that the teacher, who was a nonmember, spoke for only two-and-one-

1. *Harrah Indep. School Dist. v. Martin*, 440 U.S. 194 (1979).

2. *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976).

half minutes. (The teacher had urged further deliberation before institution of an agency shop provision, a course the board followed.)

Special interest advocacy groups also can be agents for skewing the education element in law. Overly zealous pursuit of gains, even for a truly disadvantaged group, can distort the picture. Again taking as example a unanimous Supreme Court decision, there is the 1979 case in which it was urged that in a discrimination context the definition of "otherwise qualified handicapped individual" be one "qualified in every respect except as to limitations imposed by the handicap." However, the Court held that the phrase meant one "who is able to meet all of a program's requirements in spite of his handicap."³ (The Court added that mere assumptions as to the effect of a handicap were not acceptable. Further, the Court said that reasonable accommodations must be examined before disqualifying a person with a handicapping condition.)

Even statutes intended to benefit specific groups need to be construed in the light of fiscally-responsible educational considerations, both as to the beneficiaries and as to others. Thus, when it was sought under the Education for All Handicapped Children Act of 1975 to have a school district furnish a sign-language interpreter for a deaf elementary school student who already was receiving substantial specialized instruction and related services and who was performing above average when mainstreamed, the Court by a six-to-three vote held that the student was not entitled to the interpreter.⁴ On the other hand, the Court last year unanimously required a school board to provide the "related service" of catheterization every three or four hours, a procedure that can be performed in a few minutes by a lay-person with less than an hour's training and without which a child could not attend school.⁵

Other school boards have been guilty of neglecting or perverting the educational element in some of their involvements with the courts. The most extensive and dramatic example involves racial segregation, with millions of dollars of tax money spent to defend policies that had even less support educationally than constitutionally. The uninterrupted stream of unanimous Supreme Court decisions against school boards from 1954 to 1972 in school desegregation cases is unparalleled in Supreme Court history.⁶

Also, without convincing a single Justice, a school board argued in 1968 that it could dismiss a tenured teacher for writing a letter to the newspaper that was critical of how it had handled some bond issue proposals and its subsequent allocation of financial resources between academic and athletic programs. The Court commented that "the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were

3. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

4. *Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176 (1982).

5. *Irving Indep. School Dist. v. Tatro*, 104 S. Ct. 371 (1984).

6. See E. Reutter, Jr., *The Supreme Court's Impact on Public Education* 54-74 (1982).

per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools."⁷

Likewise devoid of any Justice's support in a 1972 Supreme Court decision was the argument that on a public college campus a student organization could be deprived of recognition privileges because the president of the college found the philosophy of the group and of the national organization with which the local was loosely affiliated to be "counter to the official policy of the college."⁸ The Court observed that "the college classroom with its surrounding environs is peculiarly the 'market place of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."⁹

Such recognition by the Supreme Court of the importance to our society of public education on all levels and of the need to keep it free from control by any body has been made in many contexts.¹⁰ Respect for the teacher as professional and for various boards as educational policy makers frequently has been expressed by the Court. The very different treatment of academic matters from disciplinary matters as regards constitutional due process is a prime example.¹¹

Outdated Statutory and Policy Language

While many of the forces that lead to wasteful education-law litigation are beyond the control of educators and most lawyers, some areas for study and joint action can be identified. Many cases can be avoided or blunted simply by being clear in the codified law pertaining to the subject. What should be in writing? How should it be worded to avoid misunderstandings? This involves both knowledge of legal meanings and connotations of words that also are used in general communication, and knowledge of the subject area along with the types of problems that may arise under the policy. Arguments about meaning that might be plausible enough to withstand summary judgement often can be completely eliminated by anticipation in the code. For example, a salary schedule statement that vertical progress from step to step is based on satisfactory performance eliminates the argument that increments are automatic. Specification that horizontal progress depends on completion of courses in institutions accredited by the National Council for Accreditation of Teacher Education or the State Department of Education aborts the claim for credit for a course at a diploma mill.

Unnecessary problems with wording must be corrected at all levels, from statutes to discipline rules in individual buildings. Many statutes

7. *Pickering v. Board of Educ. of Township High School Dist.* 205, 391 U.S. 563, 570 (1968).

8. *Healy v. James*, 408 U.S. 169 (1972).

9. *Id.* at 180-181.

10. *Routter*, *supra* note 6, at 188-189.

11. *Id.* at 149-154.

have not been examined since they were written in simpler times. Compulsory education statutes—the backbone of American democracy—increasingly are coming under technical fire by those who want to go their own way free of responsibilities to a government that they perceive as overbearing. Most of these statutes were written for a different era. They are vulnerable to attack on some grounds that easily could be removed if the statutes were rewritten.¹² Then focus would be on educational substance other than on vagueness or overbreadth. The proper balance between rights of parents, both religion-based and otherwise, and rights of society could be more effectively addressed. A statute that can be invalidated on grounds of vagueness or overbreadth is poorly drawn and should be rewritten if its purpose remains desirable.

The most serious source of poor phrasing, however, is the archetypical collective bargaining contract that is agreed to only after the ritualistic "all-night bargaining session." The mischief of this situation can be compounded by the common act of slipping in at the end of the lengthy agreement a general arbitration clause. The result is to give up to an arbitrator (whose selection and educational qualifications frequently are not carefully considered by the parties, and whose powers usually are not carefully delineated in the contract) the authority to determine questions of educational import and to do so devoid of the court-system's parameters of *stare decisis* and appeal. Such a scenario becomes scarier when educational items, as distinguished from economic items, are so decided.

In fact, the very process of collective bargaining with its confrontational approach to determination of contract terms, its trade-off methodology, its deadlines, and its secrecy until the final product emerges as a unit, is uncongenial to getting the educational ingredient into the mix that eventually becomes the contract. However, as collective bargaining in the traditional mode has provided jobs for many educators and even more attorneys, it may be naive to expect much pressure to correct all of the expensive excesses that do not contribute to education. Yet one can hope for some statesmanship that would preserve the notable advantages of bilateral decision-making in education without the debilitating byproducts of inclusion of improper items and language that is imprecise.

Another deterrent to effective education law is to be found in the recent tendency for federal-level and state-level bodies to prescribe details of operation to local school authorities. It can be assumed that such pronouncements are well intentioned, and can and do prevent undesirable local practices. Undoubtedly much good has come from them. But not only can detailed prescriptions hamper local adaptations and initiatives, but they can provide predicates for assorted frivolous lawsuits by persons claiming that alleged rights so granted have been

12. See E. Reutter, Jr., *The Law of Public Education* 608-672 (3rd ed. 1985).

infringed. This phenomenon is particularly true when language appears to be mandatory rather than suggestive, when language is vague, and when the subject is process rather than substance.

Indeed, self-induced, not constitutionally required, due-process chains can be found binding many education authorities, and education can suffer needlessly. The Education for All Handicapped Children Act of 1975 appears to exalt process. So do many codes of student conduct and many provisions related to teacher evaluation in public schools and colleges. There is, of course, a revered place in our society for due process, and such should be true in our educational system. But the process due is not the maximum possible. Once granted, however, in public or private schools, authorities must observe the process under either constitutional or contract theory. We must be as certain that inclusion of specific due process provisions enhances educational values as we are certain that absence of minimum due process elements leads to legal as well as educational problems.

Dispute Resolution

It is in the area of resolution of disputes that perhaps the gravest challenges to ingenuity lie. The resolution of disputes in an adversarial manner, whether by courts or by arbitrators, needs reassessment. Perhaps it has become too easy to activate complex mechanisms to deal with minor and idiosyncratic complaints. Light punishments for misconduct and trifling adverse academic decisions regarding students, as well as trivial matters related to employed personnel, increasingly are being contested in courts. Are such matters the proper province of courts, or would other types of tribunals better serve society? The extent to which the issue is educational would seem to be the measure of the need for expertise in the decision. Although arbitration could provide this, selection and functioning of arbitrators frequently makes the process little different from the courtroom.

We must do more in education law with mediation and conciliation. Many education conflicts need solutions, not victories. More informality and emphasis on seeking the best solution often would seem preferable to a highly structured combative atmosphere leading to a rigid order of court or arbitrator. The more complex the issues, the more difficult it is to get good education into such orders. The device of the consent decree has worked well in many situations where the development of the decree has involved broad and knowledgeable participation. But the detailed consent decree can be subject to the types of evils referred to in connection with state-level regulation and collective bargaining contracts, with the added factor of difficulty in getting any changes made once the decree is issued.

Where persuasion fails, an adjudicator who is familiar with the environment of the controversy has the potential to provide a particularly effective solution. Educationally oriented adjudicators, whether special

arbitrators or state officials, can be expected to issue orders sensitive to educational concerns, yet within legal contours.

With all respect due to the adversarial process that is at the heart of our judicial system, there are situations where jurisdiction in courts probably should be circumscribed or not lie at all. There are, to be sure, constitutional and section 1983 considerations to be met, but the Supreme Court has frequently commented that the federal judiciary is not the inevitable answer.

In 1968 the Court said:

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.¹³

In 1976, it commented:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. . . . The United States Constitution cannot feasibly be construed to require federal judicial review for every . . . error. . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.¹⁴

Stated in 1975 and repeated in 1982 was:

Section 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations.¹⁵

A Question of Money?

A few months ago, in upholding a federal statutory limitation on fees that may be paid to an attorney or agent for representing before the Veterans Administration a veteran seeking benefits for service-connected death or disability, the Court recognized as a valid intent of Congress that the system be informally and nonadversarily administered so that the veteran would not need an attorney to get benefits and not have to divide an award with an attorney.¹⁶ The Court majority's discussion of how the participation of lawyers can affect proceedings and how sometimes such can militate against significant purposes of some hearings is instructive, although the point is really not esoteric.¹⁷

13. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

14. *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976).

15. *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *Board of Educ. of Rodgers, Arkansas v. McCluskey*, 458 U.S. 966, 970 (1982).

16. *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985).

17. *Id.* at 3191-3192.

Indeed the question of attorney fees is an important one to today's topic. There is no question but that the articulation of many rights that are now settled in education law would have, at best, been delayed and, at worst, denied had it not been possible to obtain attorney fees for plaintiffs prevailing against school and other government authorities. Yet there is strong reason to believe that awards of attorney fees can encourage suits that should not be brought. Even though *Carey v. Piphus*¹⁸ may have dampened some ardor for bringing a minor due process suit when the resultant deprivation is probably defensible and only nominal damages may be obtained, the possible award of fees can be attractive to an attorney with spare time.

Perhaps some limits on types of suits and types of activities by lawyers that are covered and on amounts of fees would help strike a balance between the desirability of having civil rights vindicated and the debilitating effects of meritless litigation against schools. The idea of holding those who bring frivolous suits accountable by assessing against them the costs of defense has some potential, but there is a grave danger therein of chilling some suits that might advance new theories or challenge matters of stare decisis.

Conclusion

What should be done to help insure that education is served by education law? Answers are complex and require deliberation by leaders in education, leaders in law, and philosophical and political leaders in society. First steps toward solving a problem are to recognize it in gross dimensions, to describe it, to define it, and to refine it into manageable elements that can be examined in theory and experiment. This process I have tried to nudge with today's remarks. NOLPE is uniquely the body to foster the inquiry. Educator members might give more personal attention to the challenge, as well as introducing the problem to other organizations of educators. Lawyer members might do the same in their specialized groups. Inevitably a more cross-disciplinary approach will be enhanced between schools of law and schools of education on the university level, between organizations of lawyers and organizations of educators on state and national levels, and between school authorities and their legal counsel on the firing line.

More attention must be given both to preventive law and to constructive law. Efforts are needed to avoid or impede unnecessary, meritless, or political lawsuits; but concurrently we must not fail to pursue paths of educational principle even if such may require litigation for vindication. We should seek honorable means of resolving controversies short of full-blown adversarial proceedings. When litigation comes, however, we must be certain that the educational elements are fully developed at the trial. We must seek to use the law as a support for good educational practice legislatively, administratively, and judicially.

18. 435 U.S. 247 (1978).

Unlike the situation when we met in our first national convention a few miles from here thirty years ago, the major danger today for education may well be not that bad educational practices may lead to lawsuits, but that good educational practices will be abandoned because of fear of lawsuits — not only fear of losing (which itself often is unfounded), but fear of costs of defense. Overcaution, rather than undercaution, may have become our demon. Yet, I believe it is a demon that can be exorcised by enlightened cooperation between educators and lawyers if only we set our collective minds to it. And where better to start than through NOLPE?

Teaching School Law

M. Chester Nolte

What do we want educators to remember five or ten years after completing a basic school law course? The question is perennial; it was the first question NOLPE'ans discussed at the first annual convention back in 1955 (also held in Chicago). NOLPE's first president (1955-1956) Madaline Kinter Remmlein, then NEA's Assistant Director of Research, was sure NEA could help, and she went to work at once. Her findings on the question above set the stage for beginning courses for years to come, and gave an impetus to the new movement to have school law recognized as a legitimate part of educational management.

It was obvious to those at the first annual convention that the 1954 case of *Brown v. Board of Education* would bring about fundamental changes in school management, but it was not readily apparent what school administrators would be called on to know in order to guide boards of education through the threatening shoals. The practice in those days was for the superintendent to keep the board updated on legal issues that came before them. That was before attorneys skilled in education law were as readily available as today. In fact, the early members of NOLPE (never more than 200 in number for the first 15 years) were principally superintendents and professors of school administration, with a smattering of attorneys interested in what might develop. It was not until 1970 that it became clear that superintendents could no longer perform this service, and attorneys became the dominant role-alike group in NOLPE (President John Philip Linn in 1970 doubled the membership by vigorously recruiting attorneys.)

Remmlein began with the premise that in our system every citizen is supposed to know law. But what should a school administrator know that went beyond this basic citizenship requirement? In March 1955, Remmlein composed a rough draft of some 274 school law test items which she submitted to five school law instructors for comment and revision (E.C. Bolmeier, Duke; Lee Garber, University of Pennsylvania; Warren Gauerke, Emory University; Leroy Peterson, University of Wisconsin-Madison; and Roger Shaw, Kent State University). These items were then revised and tried out at 13 institutions during the summer of 1955. On the basis of these preliminary field tests, the items were then revised and tried out in the summer of 1956 on 337 students in the school law courses at 27 institutions. The institutions were: Bucknell University, Butler University, Claremont Graduate School, Duke University, Emory University, Florida State University, George Washing-

ton University, Kent State University, Lewis and Clark College, Los Angeles State College, Mississippi College, Ohio State University, Oklahoma A. & M. College, Omaha University, Rhode Island College, University of California-Berkeley, University of Colorado, University of Florida, University of Idaho, University of Kentucky, University of Nebraska, University of North Dakota, University of Pennsylvania, University of Redlands, University of Toledo, University of Wisconsin-Madison and Western State College of Colorado.

In 1957, *School Law Test* with Remmlein as author was published by the Interstate Printers and Publishers, Inc. of Danville, Illinois. The test was copyrighted by Interstate and was used widely by instructors in beginning school law courses for approximately a decade. Complete with a *Teacher's Manual* (published separately), the test shaped early courses in the field, and provided some "standardization" to the results, although Remmlein cautioned that the small sample precluded reliability for the test.

One of the problems with the first test was the determination of what weight to give to each of the items. Should the correct analysis of a case digest be given more weight than knowledge of the meaning of a single legal word? It was. Other types of questions were considered to be of relative importance somewhere between meaning of words and analysis of case digests. "The consensus was so nearly unanimous," wrote Remmlein in the portion on weighting, "that weights were assigned and the tests scored accordingly."

With the application of weights to each question, a perfect score on the 97 items in the revised test was 180, divided as follows:

Part I: ACQUAINTANCE WITH LEGAL TERMS

Question 1.....	30 points (three groups of 10 definitions, one point each)
Question 2.....	8 points (one point for each word)
Total for Part I	38 points

Part II: WHAT EDUCATORS CAN AND CANNOT DO

Question 3.....	22 points (2 points for each of 11 legal principles)
Questions 4 through 11 ...	40 points (5 points for each of 8 case digests)
Questions 12 through 17 ..	60 points (3 points for each of 20 parts of 7 questions)
Total for Part II.....	122 points

Part III: USE OF LAW BOOKS AND OTHER SOURCES

Questions 18 through 20 ..	20 points (1 point for each item)
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While denying claim of standardization of the test, Remmlein nevertheless declared that the findings "do reveal helpful approximations." Using the high-low group method of item analysis, she sought central

tendencies by eliminating the highest 27 percent and the lowest 27 percent of the sample of 337. Her findings in part were as follows:

The mean percentage correct for the test without Part III (Use of legal resources) was 68.3 with a standard deviation of 17.2, and for the entire test including Part III was 62.2 with a standard deviation of 20.1. Six of the questions were answered correctly by over 90 percent of the sample. Eight questions were answered correctly by less than 30 percent of the sample.

All but 68 or 20 percent of the 337 students in school law classes had had some experience in the public schools. Most were classroom teachers, with 85 principals (25 percent) while 21 superintendents (6 percent) were present. All but 7 percent of the sample of 337 were graduate students.

Lack of public school experience did not appear to affect the score. What slight differences appeared, wrote Remmlein, "tended toward an inverse relationship between achievement on the test and length of experience." This might indicate, by inference, that the longer one spends in the public schools does not necessarily mean that one can gain knowledge of school law through experience alone.

Remmlein further found no relationship between the score achieved and the type of public school experience, or between the score achieved and the number of years of experience in any given position. Thus, teachers might know more school law than their principals or superintendents, since there were wide differences from individual to individual, and from institution to institution in the study.

The following observations seem to be justified in shaping the beginning course in school law:

- 1) Local conditions (presence or absence of a law library, for example) seem to be more important than content and tend to shape content in each institution (librarians need a different course from, say, counselors);

- 2) The content of the course should be aimed at the needs of the role-alike persons targeted;

- 3) The instructor's organization and teaching of the course often leave wide gaps in content and considerable variations from institution to institution and even between instructors in the same institution;

- 4) The best strategy seems to be to administer an entry examination patterned roughly after the 3-part Remmlein test at the beginning of the term for school law students (and perhaps at the end);

- 5) Due to the wide variation in prior knowledge of school law to be found in any given class group, it is necessary to adjust the content and methodology used to fit the group's needs at any given time; and

- 6) Since the main objective is to help the learner survive as an educator, what one can and cannot do as an educator in one's own job setting seems to be the most valuable information that one can teach.

Attention is drawn to the last chapter in Nolte, *How to Survive as a School Board Member: the Legal Dimension* (Chicago: Teach 'em, Inc. 1984) for a sample preliminary test in a beginning school law course.

The value of the test, while not standardized, is to determine what is known at the outset, so that the instructor can know where to begin this very important task of answering the question: What do we want educators to remember five or ten years after completing a basic school law course?